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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. ~~568~~ 17

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.

No. ~~564~~ 18

U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

FILED DECEMBER 5, 1960

PROBABLE JURISDICTION NOTED FEBRUARY 20, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 563

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.

No. 564

U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil Action File No. 12497

J-T TRANSPORT COMPANY, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT—Filed August 21, 1959

Comes now J-T Transport Company, Inc., a corporation, plaintiff herein, and for cause of action respectfully shows to the Court:

I

Jurisdictional Statement

This is an action:

(1) To enjoin, annul, and set aside orders of the Interstate Commerce Commission dated January 31, 1958, and June 15, 1959, issued in Docket No. MC-11185 (Sub-No. 102) *J-T Transport Company, Inc.—Extension—Indianapolis, Indiana*, copies of which orders are attached hereto and made a part hereof as appendices "B", and "D", respectively.

(2) To compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff in Docket No. MC-11185 (Sub-No. 102) *J-T Transport Company, Inc.—Extension—Indianapolis, Indiana*, which application is described in Appendix "A" hereto.

This action arises under the provisions of Section 205(g) of the Interstate Commerce Act, 49 USCA 305(g), Section 10 of the Administrative Procedure Act, 5 USCA 1009, and Sections 1336, 1398, 2284, and 2321 to 2325, inclusive, of the Judicial Code, 28 USCA 1336, 1398, 2284 and 2321 to 2325, inclusive.

The United States of America is named as a defendant

pursuant to Section 2322 of the Judicial Code, 28 USCA 2322.

[fol. 2] II

Parties

J-T Transport Company, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Missouri, with its headquarters and principal place of business located at 3501 Manchester Trafficway, Kansas City, Missouri. Said J-T Transport Company, Inc. for a number of years has been engaged, pursuant to authority of the Interstate Commerce Commission, in the transportation, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, between a number of points in the west and mid-west, and in so doing has conducted a substantial operation.

Also, as will be more fully hereinafter set forth, since the 5th day of August, 1957, the plaintiff has held temporary authority from the Interstate Commerce Commission in Docket No. MC-11185 (Sub-No. 103TA) to transport, as a contract carrier by motor vehicle, over irregular routes, aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Indiana, to Wichita, Kansas, and since such date has been actively engaged in performance of the transportation authorized thereby. The transportation which plaintiff has performed under temporary authority is that covered by the application for permanent authority in Docket No. MC-11185 (Sub-No. 102). Such temporary authority was terminated by the Interstate Commerce Commission following issuance of its order of July 25, 1958 in Docket No. MC-11185 (Sub-No. 102), but plaintiff is advised that by virtue of subsequent developments, upon the filing hereof plaintiff may continue to perform such transportation under temporary authority pending final adjudication of the issues presented herein.

The Interstate Commerce Commission is an administrative agency of the Federal Government established under and by virtue of the Interstate Commerce Act, as amended, said Act appearing in Title 49 of the United States Code Annotated.

The Congress has provided in Section 209(b) of the Interstate Commerce Act, 49 USCA 309(b), that the Commission shall issue a permit to any qualified applicant [fol. 3] for authority to operate as a contract carrier authorizing, in whole or in part, the operations covered by the application, if it appears that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, to conform to the provisions of the Act and the lawful requirements, rules and regulations of the Commission, and that the proposed operations will be consistent with the public interest and the National Transportation Policy declared by the Act.

Substantial amendments were made to portions of the Interstate Commerce Act relating to contract carriers by motor vehicle and the powers and duties of the Interstate Commerce Commission with respect thereto by Senate Bill No. 1384 of the 85th Congress, Public Law 85-163, 71 Stat. 411. Such amendments are of particular pertinence to the issues in this litigation, and for convenience are here reproduced, as follows:

Paragraph (15) of Section 203(a) of the Interstate Commerce Act (49 USCA 303(a) (15) is changed to read as follows:

> "(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

In the next place, Section 209(b) of the Act (49 USCA 309(b)) was amended by inserting after the second sentence of said Section 209(b) a new sentence to read as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the national

transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

[fol. 4] Said Section 209(b) (49 USCA 309 (b)) was further amended by changing the third sentence thereof to read as follows:

"The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under Section 204(a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require; *Provided, Further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in Section 203(a) (15), as in force on and after the effective date of this proviso."

The foregoing amendments became effective on August 22, 1957.

III

Statement of the Case

On March 14, 1957, J-T Transport Company, Inc. filed with the Interstate Commerce Commission an application for a permit which would authorize it to operate, as a contract carrier by motor vehicle, over irregular routes, in the transportation of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Indiana to Wichita, Kansas. The application was filed at the behest of Boeing Airplane Company, which Company, insofar as here pertinent operates a plant at Wichita, Kansas for the manufacture of airplanes for the U. S. Government. In conjunction with the application for permanent authority, as aforesaid, the plaintiff, at the request of Boeing Airplane Company, filed an application for temporary authority to perform the same transportation on a temporary basis. In the exercise of the power [fol. 5] conferred upon the Commission by Section 210(a) of the Interstate Commerce Act (49 USCA 310(a)) to grant temporary authority where there is an immediate and urgent need for service in a territory having no carrier service capable of meeting such need, after appropriate investigation the Commission did grant to plaintiff such temporary authority, under which plaintiff has been performing the involved transportation. Such authority has been extended from time to time and, plaintiffs are advised and aver, upon the filing hereof it may continue to perform such transportation, inasmuch as the issues involved have not yet been finally determined.

The primary purpose of the application was to permit plaintiffs to transport "landing gear bulkheads" from the point of manufacture in Indianapolis to the plant of Boeing Airplane Company in Wichita, Kansas, such transportation to be performed solely for Boeing Airplane Company as a contract carrier, and by petition for reconsideration filed with the Interstate Commerce Commission by plaintiffs on April 14, 1958, it was agreed that the application, which originally contained a broader commodity description, might be considered to be so amended and restricted.

The application was heard at Denver, Colorado on May 22, 1957 by an experienced examiner of the Interstate Com-

merce Commission who filed his recommended report and order on July 18, 1957, wherein he found that the proposed operation by plaintiff would be consistent with the public interest and the National Transportation Policy; that plaintiff was fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder, and that a permit authorizing such operation should be granted.

The report of the examiner contained a comprehensive and carefully prepared statement of facts, and such report is attached as Appendix "A" hereto. As will be noted from Page 3 of Appendix "B", the Commission later adopted the examiner's statement of facts in holding:

> "We find the statement of facts contained in the examiner's reports to be accurate in all respects; and, as hereafter amplified or restated for clarity of discussion, we adopt such statements as our own."

The Commission used the plural in that the Commission, in Appendix "B", was dealing with two separate and dis-
[fol. 6] tinct applications. We are here concerned only with that portion of the appendix relating to Docket No. MC-11185 (Sub-No. 102).

At the hearing before the examiner three motor common carriers and one rail carrier submitted evidence in opposition to the application. Two of these motor carriers were so-called "heavy haulers and riggers". They filed no exceptions to the examiner's recommended report and order. The rail carrier excepted to the examiner's report only insofar as the commodity description was concerned, taking the position that the commodity should be described as "landing gear bulkheads", to which descriptions plaintiffs have agreed, as aforesaid.

Plaintiffs aver, therefore, that the only opposition to their application when same was considered by the Interstate Commerce Commission was that of one motor *common* carrier which held authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character, which carrier was authorized, as a common carrier, to transport the commodity between the points involved in

this application, but which have never performed such transportation.

In due course the motor common carrier referred to above filed exceptions to the recommended report and order of the examiner dated July 18, 1957, to which J-T Transport Company, Inc. replied on September 16, 1957.

On January 31, 1958, Division 1 of the Interstate Commerce Commission, with one Commissioner absent and not participating, acting as an Appellate Division, handed down a report and order embracing in the one report and order its action on two separate applications heard on separate records. Copy of said order is attached as Appendix "B", but it should be noted that the only portion thereof with which we are here concerned is that relating to No. MC-11185 (Sub-No. 102) *J-T Transport Company, Inc.—Extension—Indianapolis, Indiana.*

The effect of the Division order was to deny to plaintiff authority to perform the involved transportation *as a contract carrier* because one *common carrier* held authority to perform the transportation as such, which carrier had never performed any such transportation, but expressed a willingness so to do as a *common carrier.*

[fol. 7] The conclusion of Division 1 appears on Page 5 of Appendix "B", as follows:

> "The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet . . . A service not needed cannot be found consistent with the public interest or the national transportation policy."

On April 14, 1958, the Aircraft Industries Association of America filed a petition for leave to intervene in said cause, and a petition for reconsideration by the entire Commission of the Division 1 report and order, and for oral argument.

On April 14, 1958, the Contract Carrier Conference of American Trucking Associations, Inc. filed a petition for leave to intervene and a petition for reconsideration by the entire Commission of the Division 1 report and order.

In due course, on April 14, 1958, J-T Transport Company, Inc. filed a petition for reconsideration by the entire Com-

mission of the report and order of Division 1 aforesaid, and for oral argument before the entire Commission.

The one motor common carrier referred to above responded to such petitions, with the result that on July 25, 1958, the Commission handed down its final order, Appendix "C" hereto, allowing the petitions for leave to intervene and denying the petitions of reconsideration and for oral argument.

Thereby plaintiff, having exhausted its administrative remedies, on August 18, 1958, in Civil Action No. 12010 in this Honorable Court, plaintiff filed its complaint challenging validity of the orders of the Commission dated January 31, 1958, and July 25, 1958, upon the grounds that same were unreasonable, arbitrary, capricious, unlawful, an abuse of discretion, in excess of statutory authority and short of statutory right for the various reasons assigned in the complaint. The cause was styled *J-T Transport Company, Inc., plaintiff*, v. *United States of America and Interstate Commerce Commission, defendants.* Injunctive relief was prayed, and it was prayed that judgment and decree be entered setting aside the aforesaid orders of the Commission and declaring same unlawful and void, and [fol. 8] ordering and directing the Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the report and order of July 18, 1957, (Appendix "A" hereto), with the commodity description changed to "landing gear bulkheads", to which plaintiff had agreed in its petition for reconsideration.

Subsequently, and before the filing of answer on behalf of either the United States of America or the Interstate Commerce Commission, Division 1 handed down a report in another proceeding which appeared, upon the face thereof, to be diametrically opposed, in material respects, to the report of January 31, 1958, (Appendix "B" hereto). Whereupon, plaintiff tendered to the Interstate Commerce Commission another petition for reconsideration which the Commission, by order of date of October 16, 1958, accepted for filing, vacating its previous order of July 25, 1958, and reopening the proceeding for consideration on the present record and issuance of a further report and order of the Commission. A true and correct copy of the order of October 16, 1958, is attached hereto as Appendix "E".

The Commission, having reopened the proceeding for further administrative action, by agreement of the parties, an order was entered in Cause No. 12010, permitting plaintiff to take a voluntary nonsuit without prejudice.

The motor common carrier which had opposed plaintiff's application throughout filed response to the petition for reconsideration and, by appropriate orders of the Commission, the Regular Common Carrier Conference of American Trucking Associations, Inc., and the Common Carrier Conference—Irregular Route, American Trucking Associations, Inc., were granted leave to intervene.

The matter was held under advisement by the Interstate Commerce Commission until June 15, 1959, at which time, by a split decision, with only eight commissioners participating, the Commission handed down its order, incorporating its report of January 31, 1958 therein, and denying the application upon the same grounds contained in the report of January 31, 1958. The report and order of June 15, 1959, served on June 25, 1959, is attached hereto as Appendix "D", and, as is obvious therefrom, same constitutes nothing more nor less than an extended argument in support of an effort to bolster the report and order of January 31, 1958.

Plaintiff has again exhausted its administrative remedies.

[fol. 9]

IV

Allegations of Error

The orders of the Interstate Commerce Commission of January 31, 1958 and June 15, 1959 (Appendices "B" and "D" hereto), reversing the recommended report and order of the Examiner (Appendix "A" hereto), denying the relief sought by the petitions for reconsideration of plaintiff and interveners and refusing to approve plaintiff's application are unreasonable, arbitrary, capricious, unlawful, an abuse of discretion, are in excess of statutory authority, and short of statutory right for the following reasons:

(1) Said orders do not include an adequate statement of findings, as well as the reasons and bases thereof, upon all the material issues of fact, law, or discretion presented on the record and are not supported by substantial evidence but, to the contrary, are in direct conflict with and in disregard of the great preponderance of the evidence.

(2) Said orders are predicated solely upon conclusions, as distinguished from findings, which find no support in the record.

(3) Said orders result from the failure and refusal of the Commission properly to interpret and apply the Interstate Commerce Act, 49 USCA Sections 301 et seq., as amended, as well as decisions of the Interstate Commerce Commission and of the Courts rendered thereunder, and same arise from a wholly erroneous construction and application of such Act.

(4) Said orders recognize, create and maintain a monopoly in one form of motor carrier transportation and in one carrier contrary to the authority vested in the Commission by the Interstate Commerce Act, the express purpose and intent of said Act, the express purpose and intent of the National Transportation Policy as enunciated by Congress (note preceding Section 301, Title 49, USCA), and the decisions of the Commission and of the Courts in construction thereof.

(5) Said orders are tantamount to a determination that irrespective of whether issuance of a contract carrier permit would be consistent with the public interest the Commission will not issue a contract carrier permit if there exists a common carrier with a certificate permitting performance, as a common carrier, of the involved transportation.

(6) Said orders, contrary to the Interstate Commerce Act, as amended, would require an applicant for a permit [fol. 10] as a contract carrier to meet the prerequisites prescribed by Congress for an applicant for a common carrier certificate before a contract carrier's permit would be issued.

(7) Said orders place an interpretation and construction upon Section 203(a) (15) of the Interstate Commerce Act (49 USCA 303(a) (15)) and Section 209(b) of the Act (49 USCA 309(b)), as amended, contrary to the intention of Congress as evidenced by the legislative history of Senate Bill 1384 of the 85th Congress (Public Law 85-163; 71 Stat. 411).

(8) Said orders constitute an attempt by the Commission to do by legislative construction that which it could not accomplish before the Congress by way of proposed amend-

ment to the Act. When Senate Bill 1384 was before the Committee on Interstate and Foreign Commerce, one amendment proposed to Section 209(b) by the Interstate Commerce Commission included a provision that a contract carrier permit would be issued when it appears, among other things, "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." The Commission was repulsed in its effort to procure such amendment but, nevertheless, by the orders attacked herein the Commission would read such amendment into the Act by legislative construction and deny to plaintiff the permit sought upon the sole ground that a common carrier, as a common carrier, expresses a willingness to provide the service for which a need for contract carriage has been shown.

(9) Said orders, contrary to the record, do not include an adequate statement of findings, and are short of statutory right in that they do not find and hold that plaintiff, under a continuing contract with one person will (a) furnish transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of such person and (b) furnish transportation services designed to meet the distinct needs of each individual customer.

(10) Said orders, contrary to the record, are not based on adequate statement of findings, and are short of statutory right in that same result from the failure and refusal of the Commission to consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the [fol. 11] services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

(11) Said orders contravene the National Transportation Policy as enunciated by Congress (note preceding Section 301, USCA, Title 49) in that they do not constitute fair and impartial regulation of all modes of transportation nor administration of the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each; nor do they promote safe, adequate, economical and efficient service and foster sound economic conditions in

transportation and among the several carriers; nor do such orders tend to develop, coordinate and preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense; but, to the contrary, said orders do and will thwart all of the objectives of such National Transportation Policy.

(12) By said orders the Commission has unlawfully withheld rights to which plaintiff is entitled.

All as provided by Section 9(e) of the Administrative Procedure Act, 5 USCA 1009(e).

V

Injury to Plaintiffs

Plaintiff would respectfully show to the Court that it has been the victim of unlawful action and abuse of discretion by the Interstate Commerce Commission in the effort of the Commission, as is so often the case with administrative agencies of late, to circumvent the express mandate of Congress, violate all rules of statutory construction and accomplish by administrative construction of legislative enactment that which it could not accomplish before Congress and that which was repudiated by Congress.

As is established by the record in this proceeding, the plaintiff, a highly specialized contract carrier, has worked closely in collaboration with Boeing Airplane Company to provide a much needed transportation service for expensive, delicate and difficult to handle airplane parts which must be moved on tight schedule from Indianapolis to Wichita with such precision as to fit into assembly line operations. In so doing the plaintiff has expended its time, [fol. 12] effort and funds in designing and procuring specialized equipment for the performance of such transportation, has employed and trained capable and experienced personnel, and has, under temporary authority, adequately and satisfactorily filled the needs of the shipper. In so doing it is performing a service no other contract carrier has authority to perform, a service which no common motor carrier has performed, and one which the rails cannot as expeditiously and efficiently perform.

By virtue of the orders of the Commission the plaintiff will, of course, lose its investment in facilities and equip-

ment as well as the revenue reasonably to be anticipated from the transportation, but the injury to plaintiff, serious though it may be to plaintiff, is of somewhat smaller proportions than the injury to the public at large, the United States Government, to shippers and to motor contract carriers.

The shipper supporting the instant application, as disclosed by the record, is producing airplanes for the United States Government, and its production schedule cannot be met unless it has available to it a contract carrier transportation service such as that plaintiff has been and proposes to perform.

In the next place, by way of petition for leave to intervene and for reconsideration of the Commission's order the Aircraft Industries Association of America, Inc. represents that its membership produces approximately 95% of the aircraft manufactured in the United States, and that its membership is grievously injured by the implications of the action of the Commission plaintiff's application; and, as well, by petition for leave to intervene and for reconsideration the Contract Carrier Conference of the American Trucking Associations, Inc. demonstrates its interest and concern at the unlawful action of the Commission.

As the record will disclose, the plaintiff in this case has met all the prerequisites of Sections 203(a)(15) and 209(b) (49 USCA Sections 303(a) (15) and 309(b) of the Interstate Commerce Act, as amended, for the issuance of a contract carrier's permit. The Commission, however, has seen fit to ignore the mandate of Congress and substitute requirements and criteria not contained in said Act, and to destroy the distinction between common and contract motor carriage, and upon such it predicates the unlawful orders here attacked.

[fol. 13] By the reports and orders here attached the Commission has added to the five enumerated tests of section 209(b) of the Act a sixth test, i.e., that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shippers' reasonable transportation requirements. Such requirement is not supported by the language of Public Law 85-163, or by the pertinent legislative history.

When the bill (S.1384) which became Public Law 85-163

was introduced, it amended section 203(a)(15) of the Act so as to define a contract carrier as one who conducts its business other than as a common carrier and—

> ". . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*"

The Senate Committee on Interstate and Foreign Commerce deleted the language underscored above. In addition, the Committee eliminated from the bill the requirement of a showing under section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers". As thus amended, the bill was enacted into law.

Contract carriers opposed the bill as originally introduced on the ground that to require proof as to the nonexistence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed and the Congress agreed. The Interstate Commerce Commission, however, by its reports, attempts to write into sections 203(a)(15) and 209(b) language deliberately stricken by the Congress. The test formulated by the Commission in its reports and the test which would have been prescribed by the language deleted from the bill by Congress are essentially one and the same, and such test is, perforce, illegal and unwarranted administrative legislation.

[fol. 14]

VI

Prayers for Relief

Wherefore, Premises Considered, plaintiff respectfully prays:

1. That this, its complaint, be filed and that all proper process issue and be served upon the defendants requiring them to appear and answer this complaint.
2. That upon hearing hereof a judgment and decree enter

herein setting aside the aforesaid orders of the Interstate Commerce Commission and declaring same unlawful and void, and ordering and directing the Interstate Commerce Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the report and order of July 18, 1957 (Appendix "A" hereto), with the commodity description changed to "landing gear bulkheads" to which plaintiffs agreed in their petition for reconsideration.

3. That in accordance with Section 2284.1 of Title 28 of the United States Code, this Court immediately notify the Chief Judge, or in his absence the Senior Judge, of the United States Court of Appeals for the Eighth Circuit to designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

4. And plaintiff prays for such other, further and general relief to which it, in the premises may be entitled.

James W. Wrape, Glenn M. Elliott, 2111 Sterick Building, Memphis, Tennessee. James F. Miller, 500 Board of Trade Building, Kansas City, Missouri. Attorneys for Plaintiff.

Of Counsel: Wrape and Hernly, 2111 Sterick Building, Memphis, Tennessee and 1624 Eye Street, N.W., Washington, D. C.

[fol. 15] Duly Sworn to by Thom Cooper (Jurat omitted in Printing).

[fol. 16] APPENDIX "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission

and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If the exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-111835 (Sub-No. 102)

J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Decided ——— —, ——

1. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans., found consistent with the public interest and the national transportation policy.

2. Dual operations approved.

3. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

James W. Wrape for applicant.

Douglas McHendrie, Paul F. Sullivan and *Ernest A. Brooks, II*, for protestants.

Report and Order

Recommended by Leo W. Cunningham, Examiner

By application filed March 14, 1957, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract

carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on May 22, 1957 at Denver, Colo. Rail carriers in the involved area and seven motor common carriers oppose the granting of the application.

[fol. 17] Applicant, as pertinent herein, now holds authority to operate as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, (except airplane engines, (1) from Grand Prairie, Tex., to Burbank, Calif., (2) from Burbank and Manhattan Beach, Calif., Brady and Grand Prairie, Tex., and Utica and Detroit, Mich., to Wichita (4) between Garland and Grand Prairie, Tex., and on the one hand, and, on the other, St. Louis, Mo., and (5) between Litchfield Park, Ariz., and Columbus, Ohio. It also holds temporary authority for 120 days beginning April 9, 1957 to operate as a contract carrier by motor vehicle, over irregular routes, of landing gear bulkheads, uncrated, requiring special equipment and special handling, from Indianapolis to Wichita. Applicant operates 33 tractors and 45 trailers. The trailer which it is using from Indianapolis to Wichita under its temporary authority and which it will use in the proposed operation if the authority sought is granted was specially constructed. It is 35 feet long, 12 feet 6 inches high and 8 feet wide. It has an underslung frame and an electric elevator is built in the trailer which operates with cables to raise and elevate the floor from the underslung part of the trailer up even to the rear wheels so that an airplane part can be rolled in or out. The roof also raises up and down with the elevator. Special floor racks move with the trailer for the loading and unloading of airplane parts. A terminal is maintained at Wichita.

Applicant's balance sheet as of April 30, 1957, shows current assets of $162,744, current liabilities of $78,333, and surplus of $240,801. Its net profit for the first 4 months of 1957 was $7,664. Applicant is fit and able, financially and otherwise, to perform the proposed operation.

Applicant has two affiliated motor carriers under common control, namely, Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, which has authority to operate as a common carrier, over irregular routes, of automobiles and trucks, in initial movements from Detroit and points in that area to certain points in Kansas and Missouri, and Jack Cooper Transport Company, Inc., which holds authority to operate as a contract carrier by motor vehicle, over irregular routes, (1) of automobiles, trucks, and buses, in initial movements, from Kansas City to points in several States, and (2) automobiles, trucks and buses, in secondary movements, between points in 14 western States.

Boeing Airplane Company supports the application. As pertinent herein, it operates a plant at Wichita for the production of airplanes. It has been using applicant's service to transport landing gear bulkheads from Indianapolis to Wichita for about 4 months to the extent of about 4 loads a month. A load consists of 4 landing gear bulkheads, each weighing about 1380 pounds. The bulkheads are made of aluminum, titanium and magnesium and extreme care must be used for their transportation. Each one is worth about $24,000. Applicant's one piece of equipment as above described was made for the exclusive use of this shipper for the operation involved herein and such equipment is necessary to adequately handle its transportation requirements from Indianapolis to Wichita. Applicant now serves this shipper and works closely with it on its transportation problems and since it has a terminal at Wichita its equipment can be furnished on short notice. The bulkheads must move in an expedited service as they must be at the plant when they have to be installed at a certain specified time. Prior to the use of applicant's service rail service was used but the cost of constructing special containers made this service prohibitive. Although in the past only landing gear bulkheads have moved other airplane parts may move in the future.

The record shows that there is interline rail service from Indianapolis to Wichita and that they are in a position to handle additional traffic.

Three motor common carriers submitted evidence in opposition to the application as pertinent herein. U. S. A.

C. Transport, Inc., operates, over irregular routes, for the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between points in the United States east of the Mississippi River, on the one hand, and, on the other, points west of the Mississippi River. It operates 115 tractors and 227 trailers [fol. 18] and maintains terminals at Indianapolis, Dallas, Tex., and Topeka, Kans., among other points. It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein. It claims that if its equipment is not suitable for the transportation requirements of the shipper herein it will construct any type of equipment that is needed.

Belger Cartage Service, Inc., operates over irregular routes, for the transportation of heavy machinery and such commodities as require the use of special equipment by reason of size or weight, between points in Missouri and Kansas. It has solicited the shipper for traffic but has never received any. Daniel Hamm Drayage Company operates, over irregular routes, for the transportation of commodities, the transportation of which, because of size or weight, require the use of special equipment, between points in Indiana and Missouri. By an interline arrangement at Kansas City these two motor carriers contend that they could handle the traffic herein. Hamm claims to have some equipment that could be used to satisfy the shipper's needs from Indianapolis to Wichita. All of the above-named three motor carriers are in a position to handle additional traffic.

Summarizing briefly, one shipper supports the application. As concerned herein, it now is using applicant's service under temporary authority from Indianapolis to Wichita. Applicant has constructed a special unit of equipment as hereinbefore described to handle the shipper's traffic as herein involved and such equipment is dedicated to the exclusive use of the supporting shipper. Applicant's terminal at Wichita is located near the shipper's plant and its special equipment can be obtained on one hour's notice. In the circumstances, the examiner is of the opinion that a need has been shown for

the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent.

Because of the affiliation and control of applicant with other motor carriers previously mentioned, the question of dual operations under section 210 of the Interstate Commerce Act arises. Applicant maintains records and personnel separate from the affiliated companies. The commodities are different and the equipment is not interchangeable. Dual operations were approved by the Commission in Nos. MC-11185 (Sub-No. 94), MC-11185 (Sub-No. 91), MC-11185 (Sub-No. 96) and MC-110077. Similar approval is warranted here as the existing situation would not be materially changed by the granting of the instant application.

The examiner finds that operation by applicant as a contract carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of the fragile nature thereof, from Indianapolis, Ind., to Wichita, Kans., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder; and that a permit authorizing such operation should be granted.

The examiner further finds that the holding of a permit by applicant and the holding of a certificate No. MC-110077 by Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, and the holding of a permit in No. MC-30884 by Jack Cooper Transport Company, Inc., will be consistent with the public interest and the national transportation policy.

It is recommended that the appended order be entered.

By Leo W. Cunningham, Examiner.

(Signature) Leo W. Cunningham, Recommended by Leo W. Cunningham, Examiner. (Signature) Leo W. Cunningham.

[fol. 19] Order

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the — day of —— A. D. 1957.

No. MC-11185 (Sub-No. 102)

J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with all requirements of section 215 and 218 of the Interstate Commerce Act, with the rules and regulations thereunder, and with the requirements established generally and discussed at some length in *Contracts of Contract Carriers*, 1 M.C.C. 628, a permit be issued to applicant authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of the commodities described, and in the manner described, in the findings in said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

[seal] Harold D. McCoy, Secretary.

[fol. 20] APPENDIX "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-11185 (Sub-No. 100)[1]

J-T-TRANSPORT COMPANY, INC., EXTENSION—COLUMBUS, OHIO

Decided January 31, 1958.

Operation by applicant as a contract carrier by motor vehicle, over regular routes, (1) in No. MC-11185 (Sub-No. 100), of uncrated airplane parts and equipment, (except airplane engines) which because of their fragile nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC-11185 (Sub-No. 102), of aircraft assemblies from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

James F. Miller for applicant in No. MC-11185 (Sub-No. 100).

James W. Wrape and *Louis I. Dailey* for applicant in No. MC-11185 (Sub-No. 102).

Paul F. Sullivan and *James K. Knudson* for a protestant in both proceedings.

Douglas McHendrie and *Ernest A. Brooks, II*, for protestants in No. MC-11185 (Sub-No. 102).

Report of the Commission

Division 1, Commissioners Hutchinson, Walrath, and McPherson by Division 1:

These applications were heard separately and were the subject of separate reports and recommended orders of examiners. Since, however, related issues are involved, they will be disposed of here in a single report.

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[1] This report also embraces No. MC-11185 (Sub-No. 102). J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Exceptions to the order recommended by the examiner in the title proceeding were filed by protestant, and applicant replied. In the sub-title proceeding, exceptions to the order recommended by the examiner were filed by rail protestants and by a motor carrier protestant, and applicant replied. Our conclusions differ from those recommended in each proceeding.

In the title proceeding by application filed October 17, [fol. 21] 1956, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment, (except airplane engines) which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio.

In No. MC-11185 (Sub-No. 102), by application filed March 14, 1957, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans.

U. S. A. C. Transport, Inc., hereafter called U.S.A.C., opposes both applications, and Ace Dran Hauling and Rigging Co., Daniel Hamm Drayage Company, Al Jeffries Trucking Co., Nieman Transfer and Storage Co., Taylor Heavy Hauling Co., Belger Cartage Service, Inc., and class I rail carriers in western trunkline territory oppose the Sub-No. 102 application.

The examiner in each proceeding recommended a grant in its entirety of the considered application. In the title proceeding, on exceptions, U.S.A.C., assigns error to the examiner's findings (1) that shipper requires a type of service which cannot be rendered by it, and (2) that the evidence warrants the granting of the authority sought. It asserts that the examiner erred in failing to find that shipper's support is based on preference rather than need for service. It also argues that the record does not establish a basis for the inclusion of the term "equipment" in the recommended commodity description, and that if any au-

thority is granted applicant, it should be restricted to a one-way movement. Applicant in reply contends (1) that the record is clear that shipper requires the specialized service proposed, (2) that applicant is the only carrier of record capable of performing this type of service, and (3) that a two-way service is needed. It urges approval of the examiner's findings.

[fol. 22] On exceptions in No. MC-11185 (Sub-No. 102), rail protestants object to the commodity description recommended by the examiner as being too broad, stating that it should be limited to "landing gear bulkheads". In its exceptions, U.S.A.C. asserts that the examiner's findings ignore the fact that it is a specialized common carrier of aircraft parts and is experienced in the handling of delicate or fragile shipments; that shipper's desire for a contract carrier with a terminal at Wichita is not in itself sufficient reason for granting the application; that it has equipment with which to perform a service similar to that proposed; that it is willing, if necessary, to modify its existing trailers to the extent required; and that existing common carrier service has not been shown to be inadequate in any material respect. It further contends that in this and other pending proceedings applicant, with the cooperation of the supporting shipper, plans to siphon off lucrative traffic, leaving it to haul the less desirable shipments; that in so doing, applicant's *modus operandi* is to construct a special trailer before seeking operating authority, whereupon it asserts that no existing carrier has the type of equipment required to perform the proposed service. Applicant in reply denies generally the contentions of exceptants and urges that the application be granted.

The evidence adduced in each proceeding, the examiners' recommendations, the exceptions, and the replies thereto have been considered. We find the statements of facts contained in the examiners' reports to be accurate in all material respects; and, as hereafter amplified or restated for clarity of discussion, we adopt such statements as our own.

Applicant is a contract carrier by motor vehicle of uncrated aircraft parts and equipment and conducts substantial operations between various points in the West and Midwest. It holds temporary authorities, conditioned to

expire upon final determination of these proceedings, to transport the commodities and from, to, and between the points applied for in the two applications. The application in the title proceeding is supported by North American Aviation, Inc., hereafter called North American, and the other application is supported by Boeing Airplane Company, hereafter called Boeing.

[fol. 23] North American manufactures principally military aircraft. It subcontracts for parts which are shipped to its Columbus plant for use in the assembly of finished aircraft. As pertinent here, certain items are purchased F.O.B. from subcontractors in Grand Prairie and Garland. These items are made of metal highly susceptible to damage and must be transported in closed equipment for reasons of protection and security. Shipper previously used air freight for transportation of these items. However, when the airline introduced a type of plane whose smaller doors would not permit the loading of certain of the items, shipper requested applicant to perform the service. Shipper is using applicant's service from points of origin other than those involved here; and such service, together with that rendered by applicant under temporary authority, is satisfactory. Production schedules for the assembly of finished aircraft are such that shipper must control and direct the movement of the considered commodities, and the traffic must be handled with meticulous care. Specially designed transportation equipment must be used. Applicant modified certain of its equipment to meet the specifications of the shipper.

Boeing assemblies aircraft at Wichita. Prior to its use of applicant, shipper used rail service for the transportation to its Wichita plant of landing gear bulkheads from Indianapolis. Rail service proved unsatisfactory, however, because of slow transit time and because of the necessity of using expensive crating to protect the lading from damage. Specially designed motor carrier equipment is required, and applicant modified certain of its equipment to meet the specifications of this shipper. Applicant's service under temporary authority is satisfactory.

Two of the three motor common carriers which submitted evidence in opposition to the application in MC-11185 (Sub-No. 102) are so-called heavy haulers, one with author-

ity to operate between points in Missouri and Kansas, and the other holding authority to operate between points in Indiana and Missouri. By an interline arrangement at Kansas City, these two claim to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction.

U.S.A.C. is authorized, as here pertinent, to transport aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) from Indianapolis to [fol. 24] Wichita. It specializes in the transportation of aircraft parts and equipment, operates 173 tractors and 225 trailers. It has a terminal at Dallas, Tex., approximately 15 miles from Grand Prairie and Garland, and one at Wichita. It is willing and able to modify as much of its equipment as is needed to meet shippers' specifications, but has never been requested by either supporting shipper to do so. Because of its specialization in the transportation of aircraft parts and equipment, it is able to adapt its operations to any production schedules which shippers may set up. Neither North American nor Boeing has attempted to avail itself of the services of U.S.A.C., or, so far as these records show, of any other common carriers.

Here we have a situation in which the supporting shippers have made no attempt to utilize the services of existing carriers, one of which specializes in the transportation of the commodities here involved. True, applicant specially modified certain trailers for use in the transportation of the aircraft parts here involved and has satisfactorily served the supporting shippers under its temporary authorities. But neither these facts nor the desire of the supporting shippers to continue utilizing applicant's service, standing alone, are sufficient to warrant a grant of the authority sought. The existing services of the opposing carriers which appear to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to be inadequate. In fact, no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers. The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that there is a need for

the service proposed which existing carriers cannot or will not meet. Compare *Girton Bros., Inc., Extension—Louisville*, 69 M.C.C. 229, and *Warren Transport, Inc., Com. Car. Application*, 69 M.C.C. 241. A service not needed cannot be found consistent with the public interest or the national transportation policy.

In No. MC-11185 (Sub-Nos. 100 and 102), we find that applicant has failed to establish that the respective proposed operations are consistent with the public interest and the national transportation policy, and that each application should be denied. An appropriate order will be entered.

Commissioner Walrath, being necessarily absent, did not participate in the disposition of these proceedings.

[fol. 25] Order

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 31st day of January, A.D. 1958.

No. MC-11185 (Sub-No. 100)

J-T Transport Company, Inc., Extension—Columbus, Ohio

No. MC-11185 (Sub-No. 102)

J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said applications, be, and they are hereby, denied.

By the Commission, division 1.

[seal.] Harold D. McCoy, Secretary.

[fol. 26] APPENDIX "C" TO COMPLAINT

Order

At a General Session of the Intertate Commerce Commission, held at its office in Washington, D. C., this 25th day of July, A. D. 1958

No. MC-11185 (Sub-No. 100)

J-T TRANSPORT COMPANY, INC., EXTENSION—COLUMBUS, OHIO (Kansas City, Mo.)

No. MC-11185 (Sub-No. 102)

J-T TRANSPORT COMPANY, INC., EXTENSION—INDIANAPOLIS, IND.

Upon consideration of the record in the above-entitled proceedings, and of:

(1) Petition of Aircraft Industries Association of America, Inc., to intervene, filed April 14, 1958;

(2) Petition of Contract Conference of American Trucking Associations, Inc., to intervene in both proceedings, dated April 14, 1958;

(3) Reply to Petition for leave to intervene in (1) and (2) above by U.S.A.C. Transport, Inc., protestant, dated May 9, 1958;

(4) Petition of applicant in No. MC-11185 (Sub-No. 100) for reconsideration and oral argument, filed April 11, 1958;

(5) Petition of applicant in No. MC-11185 (Sub-No. 102) for reconsideration and oral argument, filed April 14, 1958;

(6) Petition of North American Aviation, Inc., intervener in support of the application in No. MC-11185 (Sub-No. 100) for reconsideration and oral argument, filed April 18, 1958;

(7) Petition of Contract Carrier Conference, of American Trucking Associations, Inc., in both proceedings for reconsideration, filed April 14, 1958;

(8) Petition of Aircraft Industries Association of America for reconsideration and oral argument in both proceedings, filed April 14, 1958;

(9) Reply, to the above petition for reconsideration

and/or argument, of U.S.A.C. Transport, Inc., protestant, dated May 12, 1958;

and good cause appearing therefor:

It is ordered, That Aircraft Industries Association of America, Inc., and the Contract Carrier Conference of American Trucking Associations, Inc., be, and they are hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings herein;

It is further ordered, That said petitions for reconsideration and/or oral argument in both proceedings be, and they are hereby, denied, for the reasons that (a) the findings of division 1 are in accordance with the evidence and the applicable law and (b) no sufficient cause appears for reopening these proceedings for oral argument.

By the Commission.

[SEAL.] Harold D. McCoy, Secretary.

[fol. 27] APPENDIX "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Date of Service
June 25, 1959

No. MC-11185 (Sub-No. 100)[1]

J-T TRANSPORT COMPANY, INC., EXTENSION—COLUMBUS, OHIO

Decided June 15, 1959

Upon reconsideration, findings in prior report, 74 M.C.C. 324, decided January 31, 1958, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC-11185 (Sub-No. 100), of uncrated airplane parts and equipment (except airplane engines), which because of their fragile nature require special handling and special equipment, between Grand Prairie and

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[1] This report also embraces No. MC-11185 (Sub-No. 102), J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC-11185 (Sub-No. 102), of aircraft assemblies uncrated, which because of their fragile nature require special handling and special equipment, from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

Appearances as shown in the prior report, and, in addition:

Harry R. Brashear, Clarence D. Todd, Dale C. Dillon, Vern W. Porter, Robert J. McBride, Albert B. Rosenbaum, Roland Rice, John C. Bradley, and *James E. Wilson* for interveners in one or both applications.

Report of the Commission on Reconsideration

By the Commission:

In these proceedings J-T Transport Company, Inc., of Kansas City, Mo., seeks permits authorizing operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC-11185 (Sub-No. 100) of uncrated airplane parts and equipment (except airplane engines), which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in Sub-No. 102 of Aircraft assemblies,[2] uncrated, [fol. 28] requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans. U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., opposes both applications and six so-called heavy haulers, and class I rail carriers in western trunkline territory also oppose the Sub-No. 102 application.

In the prior report, 74 M.C.C. 324, decided January 31, 1958, division 1 denied both applications. Petitions for reconsideration and a request for oral argument were filed by

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[2] Applicant in its petition for reconsideration and request for oral argument, dated April 12, 1958, indicated a willingness to restrict the commodity description to "landing gear bulkheads."

applicant in each proceeding; Aircraft Industries Association of America, Inc., and the Contract Carrier Conference of the American Trucking Associations, Inc., filed petitions for leave to intervene in support of applicant and for reconsideration or further hearing in both proceedings; and North American Aviation, Inc., intervener in support of applicant, filed a petition for reconsideration in the title proceeding. U.S.A.C. replied to each petition. By order of July 25, 1958, Aircraft Industries Association and the Contract Carrier Conference were permitted to intervene, and the petitions were denied in all other respects. Upon further consideration of the records and of second petitions in each proceeding by applicant for reconsideration, and of replies thereto by U.S.A.C., we reopened the proceedings for reconsideration on the present records. Subsequently, the Common Carrier Conference-Irregular Route and the Regular Common Carrier Conference of the American Trucking Associations, Inc., were permitted to intervene.

The material facts in each proceeding are not in dispute. Applicant, a motor contract carrier of uncrated aircraft components and assemblies, conducts operations between various points in the West and Midwest. It maintains [fol. 29] terminals at Wichita and Kansas City, Kans., and Grand Prairie, and operates 33 tractors and 45 trailers. Each of its trailers is suitable for transporting aircraft parts, and each is equipped with special fixtures designed to handle the particular parts transported. It regularly assigns certain vehicles to each of its various customers for its exclusive use, and at the time of the hearing was serving eight different aircraft manufacturers. Its drivers have security clearance.

North American Aviation, Inc., hereinafter called North American, supports the title application. It is a principal contractor with the Federal Government for certain types of military aircraft which it produces at its plant in Columbus. Certain component parts of these aircraft, such as fuselage sections, flaps, tips, and pylons, are purchased f.o.b. from sub-contractors located at Grand Prairie and Garland. These items are constructed principally of titanium, aluminum, and stainless steel and are highly susceptible to damage; therefore, they must be transported in specially-fitted, closed equipment for protection as well as for security rea-

sons. Because of their intended use as components of airplanes, it is essential that the parts arrive in perfect condition. Likewise, dependable service is of the essence as it is not practicable to stockpile these articles; and, unless the parts arrive undamaged and according to schedule, North American's assembly-line schedule is disrupted. This shipper formerly used air freight for the transportation of these items but occasionally there was damage to some of the parts which moved by air; and when the airline introduced a type of plane whose smaller doors would not permit [fol. 30] the loading of certain of the items it requested applicant to provide the service. Applicant modified two of its trailers to fit specifications submitted by this shipper; assigned this equipment to its exclusive use; and pursuant to appropriate temporary authority transported 18 shipments between Grand Prairie and Garland, on the one hand, and, on the other, Columbus during a 3-month period. Its service was entirely satisfactory and shipper desires its continuance. Although the shipper knew of U.S.A.C.'s service, it did not request this carrier to provide equipment or offer it the traffic.

Boeing Airplane Company, hereinafter called Boeing, supports the Sub-No. 102 application. A manufacturer at Indianapolis supplies Boeing with landing-gear bulkheads which it installs in planes at its Wichita assembly plant. The dimensions of the forward and aft bulkheads are 128 by 90 by 42 inches and 122 by 181 by 24 inches, and they weigh 1,380 and 1,340 pounds, respectively. The service needed as regards the movement of landing-gear bulkheads are similar to those of North America in that these articles, because of their nature, must be transported in specially-designed, closed equipment, with their delivery being made in accordance with Boeing's production schedule. While applicant must deadhead its equipment 700 miles from Wichita to Indianapolis to perform the proposed service, it has sufficient advance notice to schedule the movement. Prior to the use of its service under appropriate temporary authority, the shipper used rail service, but the necessity of constructing special containers made the cost of this service prohibitive. During a 4-month period applicant transported about four shipments a month in one of its trailers equipped with special fixtures for transporting this particular shipper's

[fol. 31] traffic and assigned to the exclusive use of shipper. This service has been highly satisfactory. Although the shipper knew that U.S.A.C. was authorized to perform the proposed service, it did not request that carrier to supply equipment for the reasons that U.S.A.C.'s tariff provides that it can exercise control over the type of equipment that will be used for any particular shipper, and, in 1953, it had unsatisfactory experiences in the use U.S.A.C.'s service.

U.S.A.C. holds certificates authorizing it, insofar as here pertinent, to transport, over irregular routes, aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) between Indianapolis and Wichita. Approximately 60 percent of its traffic consists of aircraft parts other than engines and the remainder consists principally of aircraft engines. As a result of having served the aircraft industry almost exclusively over a period of years, it is accustomed to modifying its equipment to meet the specific requirements of particular aircraft manufacturers, and it is able to tailor its service to fit the production schedules established by its customers. It maintains, among others, terminals at Dallas, Tex., approximately 15 miles from Garland and Grand Prairie, and at Topeka, Kans., and Indianapolis. It operates 173 tractors and 225 trailers, some of which, if fitted to the shippers' specifications, would be suitable for transporting the considered traffic. Its drivers are required to have security clearance. If tendered the considered traffic, it would modify and make available to the shippers whatever equipment is necessary to meet their transportation requirements.

[fol. 32] Two so-called heavy haulers, both common carriers, submitted evidence in opposition to the Sub-No. 102 application. Belger Cartage Service, Inc., holds authority to operate between points in Missouri and Kansas, and Daniel Hamm Drayage Company is authorized to operate between points in Indiana and Missouri. By interlining at Kansas City, they purport to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction. There is also interline rail service from Indianapolis to Wichita.

In the prior report division 1 found that the motor transportation desired by North American and Boeing could be

provided adequately by U.S.A.C.; that there was no need shown for the proposed service; and that the applicant had failed to establish that the proposed operations would be consistent with the public interest and the national transportation policy. On petition applicant contends (1) that the type of service required to meet the supporting shippers' reasonable transportation requirements in each proceeding can only be provided by a contract carrier; and that protestants, all common carriers, are not authorized to perform such service, (2) that the decision in the prior report is at variance with that of the District Court in *Bass* v. *United States*, 163 F. Supp. 1, because of a failure to consider whether adequate contract-carrier service was available, and (3) that the criteria as set forth in sections 203(a)(15) and 209(b), as amended, of the Interstate Commerce Act must be determinative of applications seeking contract-carrier authority, and that proper consideration has not been given to these sections of the statute, (4) that the legislative history preceding the 1957 amendments to the sections referred to in (3) above reveals that willingness and ability of common carriers to transport the traffic [fol. 33] should not bar a grant of contract-carrier authority, (5) that as a practical matter, U.S.A.C. does not have the specialized equipment required for the considered movements, could not adapt its equipment to handle this traffic, and is unable to provide the personalized service which the supporting shippers require, and (6) that a denial of the applications would give U.S.A.C. a monopoly with respect to the traffic.

U.S.A.C. replies (1) that, as a specialized carrier of aircraft parts, albeit a common carrier, it offers and can provide substantially the same type of service as that proposed by applicant; and that it is willing to modify its equipment to meet the shippers' specialized needs and to dedicate certain of its equipment to the shippers' exclusive use, (2) that sections 203(a)(15) and 209(b) do not contain the sole elements for consideration in the disposition of applications for contract-carrier authority, (3) that the 1957 amendments to the act affecting contract carriers do not relieve an applicant seeking contract-carrier authority of the burden of establishing a need for the proposed service, (4) that, inasmuch as the supporting shipper in each case

has failed to use its services, existing service has not been shown to be inadequate, and (5) that it should be afforded a reasonable opportunity to demonstrate its available service before an additional competitive service is authorized.

Discussion and Conclusions

In view of the issues raised by the pleadings with respect to the interpretation to be placed upon the 1957 amendments of sections 203(a)(15) and 209(b) of the act, we deem it appropriate to discuss fully the matters of statutory construction presented herein in the light of the background of [fol. 34] our prior consideration and disposition of applications for contract carrier operating authority, of decisions in which the distinction between common and contract carriage has been explored, and of the events which led to the enactment of these amendments.

Prior to the 1957 amendments to the act, the definition of a contract carrier by motor vehicle, contained in section 203(a)(15) provided:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

The definition of a common carrier by motor vehicle, which was not affected by the 1957 changes in the act, contained in section 203(a)(14) reads:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation. . .

Over a period of some 20 years literally hundreds of new service or extensions-of-service contract carrier applications requiring the application of the above-stated definition in relation to other sections of the act have been considered and disposed of by this Commission. In these proceedings

certain distinctions between motor contract carrier and motor common carrier operations have evolved, and for a clear understanding of the matters under consideration here some discussion of this historical development preceding the 1957 amendments is appropriate at this point.

[fol. 35] The only limitation imposed by definition upon transportation which may be provided by a motor common carrier is that it must be held out to the public generally. In other words, a motor common carrier is required through its tariffs to make a continuing offer to the general public of any service which it proposes and which it is authorized to perform. Other than this requirement and those limitations contained in its certificate with respect to commodities, territories, or otherwise, no restriction is imposed upon the manner in which a common carrier may perform its physical operations, provided, in all instances, that the same service is made available to all who may desire to use it. It may perform, and in numerous instances the terms of its certificate limit its operations to the performance of, a so-called special service. On occasions the very terms of a common carrier's certificate make it necessary for it to provide special vehicular equipment such as a tank vehicle or a low-boy unit, and the inherent nature of the service authorized confines its activities to a certain industry. Within the terms of its certificate, however, it is under a duty to serve all members of the public desiring its service.

Thousands of certificates authorizing special types of operations have been issued; and U.S.A.C.'s operation is a classic example of a common carrier "specializing" in service for a particular industry. Its services are legitimately within the scope of a common carrier's function if such services are held out to all who can use them. Fundamentally, each service performed by a common carrier must, of necessity, be "specialized" to a certain degree to meet the particular needs attending the movement of any commodity. What could be more specialized than the services furnished [fol. 36] by the so-called oil-field carriers to the oil and gas industries? The nature and variety of the services of these common carriers, both in respect to the commodities handled and the special equipment and other facilities furnished, is detailed in *Mercer Extension—Oil Field Commodities*, 74

M.C.C. 459; and many similar situations could be cited. The conclusion, therefore, is inescapable that a motor common carrier may, in accordance with the statutory definition, physically provide all transportation services within the scope of its authority, consistent with its duty and obligations as a common carrier, and with any degree of specialization necessarily inherent to the traffic transported.

On the other hand, specialization has always been a factor considered by us when it is necessary to determine whether an operation is common or contract carriage, as, for example, in *Craig Contract Carrier Application,* 31 M.C.C. 705, 712, where it was stated:

> We recognize, of course, that even specialization in physical operation does not negative a common-carriage status where, for example, such physically specialized services are affirmatively held out to all shippers in that particular class of the public having a need therefor. But, on the other hand, we are convinced that the lack of one or the other forms of specialization above indicated conclusively negatives contract carriage as contemplated by section 203(a)(15) of the act.

In commenting on this report, the Supreme Court in *United States* v. *Contract Steel Carriers,* 350 U. S. 409, 411, said: "A requirement of specialization is supported by respectable legislative history."

[fol. 37] As seen, prior to these amendments, even where a highly specialized service was proposed, the existence of common carrier service, if any, and whether or not that service would meet the reasonable transportation needs of those supporting the application, was always considered in our determination of applications for contract carrier authority. The ability of common carriers to compete with contract carriers for the same traffic has been recognized from the inception of motor carrier regulation in 1935, and in each contract carrier application opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application. Early, in *C. & D. Oil*

Co. Contract Carrier application, 1 M.C.C. 329, 332 an application for contract carrier authority, it was said:

> We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed.

For many years this principle has been followed in disposing of applications for contract carrier permits opposed by common carriers, the decisive factor being whether the available common carrier service was reasonably adequate to meet the transportation needs involved.[3]

[fol. 38] The import of applicant's position here is that under the 1957 legislation this long-established principle has been abandoned, and that this legislation was intended not only to delineate the distinction between common and contract carriage, but was also intended so to separate these two types of motor transportation as to virtually eliminate the ability of a common carrier to compete with a contract carrier for the same traffic, and thus to render the fact that motor common carrier service available is of little or no weight in the disposition of contract carrier applications. In our view such a position is untenable.

As of August 22, 1957, the definition of a contract carrier by motor vehicle in section 203(a)(15) of the act was amended to read as follows:

> The term 'contract carrier by motor vehicle' means any person which engages in the transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than

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[3] *Arrow Transp. Contract Carrier Application*, 73 M.C.C. 261; *Refiners Transport, Inc., Extension—Missouri*, 71 M.C.C. 272; *Overland Freight Lines, Inc., Extension—Kentucky*, 69 M.C.C. 143; *Guer Extension—Chicago Commercial Zone*, 67 M.C.C. 224; *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561; and *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311.

> transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct needs of each individual customer.

At the same time section 209(b) was also amended. As pertinent, it provides that:

> . . . In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this act, the Commission shall consider the number of shippers to be served by applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon applicant and/or its shipper and the changing character of the shipper's requirements. . .

[fol. 39] Both amendments were enacted as a result of certain proposals made by us to Congress in our 70th annual report, wherein we noted at page 163 that amendments were needed to *preserve* the distinction between contract and common carriers and to insure that all contractural arrangements of contract carriers would cover only individual and specialized service. As we have indicated, these proposals were prompted by the fact that under the prior law, as construed by the Courts, contract carriers were free to add contracts within the scope of their permits. Before the decision in the *Contract Steel Carriers case*, there were instances in which some contract carriers expanded their activities to such an extent that they were serving numerous shippers and were otherwise conducting their operations in a manner which raised serious doubts as to whether they were operating lawfully as contract carriers. Proceedings were instituted against certain of these carriers, and among the factors considered in determining whether they were operating as *bona fide* contract carriers was the number of transportation contracts into which they had entered.

Transportation Activities of Fischbach Trucking Co., 61 M.C.C. 185; *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 51 M.C.C. 355, 52 M.C.C. 33, and 52 M.C.C. 261. The *Contract Steel Carriers case*, in effect, served to preclude consideration by us of the number of shippers served as one of the criteria for determining such proceeding, and opened the door to contract carriers to negotiate an unlimited number of transportation contracts. Thus too often the distinction between contract and common [fol. 40] carrier service vanished, since contract carriers, due to their ability to negotiate numerous additional contracts, were in effect offering their services to the public generally. It was to preserve or reinstate the distinction between common and contract carriage, both in respect to specialization and the number of shippers to be served, that the 1957 amendments were enacted.

As originally proposed, section 203(a)(15) would have defined a contract carrier as one which, among other things, furnishes transportation service "not provided by common carriers" and section 209(b) would have required that this Commission, before granting contract carrier authority, make the findings, among other things, that "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." While Congress was still considering this proposal, we concurred in the deletion of the above-quoted language for the reason that it was not considered necessary to carry out the purpose of the amendments. This deletion should not be construed as an expression of an intention on the part of Congress to eliminate the standing of common carriers to oppose contract carrier applications, but rather its purpose was to insure that too heavy a burden of proof was not imposed upon contract carrier applicants. Thus, in explaining to the Senate [fol. 41] Subcommittee on Surface Transportation the proposed modifications in the bill to revise the definition of the term "contract carrier by motor vehicle," we noted:

> These words are not necessary to carry out the purpose of the bill and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized service.[4]

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[4] S. Rep. No. 703, 85th Cong., 1st. Sess. 5(1957).

And former Chairman Clarke, who, in testifying before the same Senate subcommittee, stated:

> I wish to state at this point, that because of the very difficult burden or proof that would be imposed on applicants by the last mentioned provision, (that is, that additional permits may be issued only upon a showing that existing common carriers are unable or unwilling to render the required type of service) the Commission, upon further consideration, has voted to withdraw its recommendation to amend section 209(b) in this respect.[5] (Matter in parenthesis added).

We think it clear that the purpose of Congress in enacting the 1957 amendments was to sharpen the distinction between common and contract carriage by imposing upon contract carriers specific restrictions as to the number of shippers which they may serve and the type of service which they may perform; that Congress did not intend or even contemplate the abandonment of our long-continued practice of considering the adequacy of existing common as well as contract carrier service in determining whether a need has been established for a proposed contract carrier operation; [fol. 42] and that there is no indication in the language of these amendments or in the legislative history surrounding their enactment that Congress intended to place any limitation upon the type of service which a common carrier may lawfully perform. Plainly there was no intention to enhance the economic position of the contract carrier at the expense of the common carrier. We conclude therefore, that a common carrier may perform, as it could prior to these amendments, a variety of specialized services, so long as it operates within the scope of its certificates and holds itself out to perform these same services for all members of the particular segment of the shipping public which has a need for them and which it is authorized to serve. And certainly there is nothing in the legislative history or elsewhere to support the proposition that, under the amendments, an applicant, once it establishes that its proposed operation falls within the definition of contract carriage, is

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[5] Hearing before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce 85th Congress., 1st Sess., at 22(1957).

entitled automatically to a grant of authority consistent with the desires of the supporting shippers, regardless of the availability of common carrier service, or even contract carrier service. Such a construction would negative the history of the new legislation and run contrary to the provisions of the national transportation policy which must be considered in the disposition of all applications for operating authority.

Section 209(b) as it now reads sets out certain criteria which we must consider in determining whether a grant of authority will be consistent with the public interest and the national transportation policy. Most of these points may be best discussed in relation to the peculiar facts of the instant applications, but it should be noted here that one [fol. 43] of the factors to be considered is the effect which a grant of authority would have upon the services of protesting carriers. The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them. The question presented, then, is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before. Any doubt that we might have that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized is disspelled by the specific wording of section 209(b), and a number of applications for contract carrier authority have, in fact, been denied since the passage of the 1957 amendment in

spite of the fact that the only opposition was that of common carriers.[6]

It should also be pointed out here that there is no indication that Congress intended the criteria contained in section [fol. 44] 209(b) to be exclusive or to preclude our consideration of other factors in determining contract carrier applications. It has consistently been held that all sections of the act must be interpreted and administered in accordance with the national transportation policy which provides, as pertinent:

> It is hereby declared *to* be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . .

In *Schaffer Transportation Company* v. *United States*, 355 U. S. 83, 88, the Supreme Court said: "[T]his Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." The Congressional mandate could not be carried out if we were to close our eyes to any matter which might affect the good of the national transportation system as a whole. Surely sound economic conditions in the transportation industry could not be maintained if common carriers, who have the obligation of providing service to the public at large within the scope of their authorities, were faced with a situation in which available traffic could be, as it were,

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[6] *Wagner Contract Carrier Application*, 77 M.C.C. 777; *Coastal Motor Lines Contract Carrier Application*, 77 M.C.C. 510; *Woodward Extension—Woodblocks*, 76 M.C.C. 377; and *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254.

withdrawn from general circulation and given to contract carriers, without these common carriers being given the opportunity to make an effective showing of their willingness and ability to provide needed service.

[fol. 45] Determination of the Instant Applications

We think that the application of the foregoing principles to the instant applications justifies some repetition of matters previously discussed generally. In deciding any application for contract carrier authority we must consider whether the operation proposed and the over-all operations of the applicant are those of a contract carrier. As noted, under the amended definition of a contract carrier (section 203(a)(15)), a person, in order to be a contract carrier

1. must be a carrier for hire, but not a common carrier; and

2. must serve, under continuing contracts, one or a limited number of persons, and either

(a) assign vehicles for a continuing period of time to the exclusive use of each person served, or
(b) furnish services designed to meet the distinct need of each individual customer.

Applicant presently has contracts with nine aircraft manufacturers, and all its pending applications, including the two under consideration here, are supported by shippers with which it already has contracts. Applicant does not hold out its service to the public generally, but offers to serve only these nine shippers. We conclude therefore, that it is a for-hire carrier, but not a common carrier as defined in the act, and serves a limited number of persons under continuing contracts. In addition, its usual practice is to assign vehicles to the exclusive use of individual customers for continuing periods of time, and it would follow this practice with respect to the service proposed here should the instant applications be granted. In view of the unusual design and fragile nature of the subject articles, [fol. 46] the security considerations, and the necessity for coordinating the delivery of the considered items with the shippers' production schedules, it is obvious that applicant

proposes to render a specialized service. Taking all these matters into considertaion, we think it clear that the operations proposed come within the new definition of contract carriage.

Also, as previously noted in determining whether a grant of contract carrier authority will be consistent with the public interest and the national transportation policy, we are required by section 209(b) to give consideration to the following factors: (1) The number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon the services of protesting carriers, (4) the effect of a denial on applicant and its supporting shipper, and (5) the changing character of the shipper's requirements.

The first factor, number of shippers to be served, is, as we understand it, to be considered on the basis of applicant's present and proposed situation in relation to the question whether applicant intends to serve "one or a limited number of shippers," and is thus a *bona fide* contract carrier as defined in section 203(a)(15) of the act. As seen by the foregoing, applicant meets this particular requirement.

The next factor, the nature of the proposed service, is one which must be considered particularly carefully in any case such as this where a contract carrier application is opposed by a common carrier. We must determine whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. It should be noted here that the requirements of many shippers could quite satisfactorily be met by either [fol. 47] a common or a contract carrier. If the carrier serves a limited number of shippers under continuing contracts and assigns vehicles to the exclusive use of each, it meets the statutory definition of a contract carrier, even though the equipment supplied or the service which it renders may be indistinguishable from that offered by common carriers. We have already determined that the service applicant proposes meets this definition.

The requirement of section 209(b) that we consider the effect which a grant of authority would have upon the services of protesting carriers has, we believe, been adequately discussed. It is sufficient at this point to say that, in view

of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories they serve before a competitive service is authorized is sound doctrine, in the public interest, and in the furtherance of the national transportation policy, whether the application is one for common or contract carrier authority.

Section 209(b) next requires us to consider the effect of a denial on applicant and its supporting shipper. With respect to the effect of a denial on applicant, we note that although applicant has incurred substantial expense in fitting certain of its trailers to the shippers' specifications, this equipment is of the type which is suitable generally for [fol.48] transporting aircraft parts and may, with modifications, be used to handle other traffic. In any event, both applicant and its supporting shippers knew or should have known that U.S.A.C. held the requisite authority to provide the proposed services, and therefore their agreement and the expenditures made by applicant prior to the filing of the application cannot be allowed to be controlling, of themselves, in resolving the issues presented here. Any other construction of such preapplication action by either a shipper or a prospective applicant would open the door to numerous abuses and thwart the basic purpose of our regulation and the national transportation policy.

Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon

the very kind of traffic as is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offers such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transport-
[fol. 49] ing aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the excluive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service.

Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary the very business of U.S.A.C. is the transportation of the type of traffic involved.

[fol. 50] The final matter which section 209(b) directs us to consider in determining contract carrier applications is the effect which a denial would have upon the changing character of the shipper's requirements. What this criterion refers to, we believe, are situations in which a shipper presently being provided with a complete trans-

portation service by a contract carrier experiences a change in such things as the marketing areas which it serves, the commodities which it handles, or the location of its plants, which require that its carrier acquire additional operating authority if it is to continue to render a complete service. There is no indication that such a situation exists here with respect to either of the two supporting shippers.

At this point we wish to make clear, as hereinbefore indicated, that the matters discussed are not the only ones which should or can be considered in the determination of contract carrier applications. While they embrace the important considerations of the need for the proposed service and the adequacy of existing service, they are not all inclusive, and other factors affecting the public interest and the national transportation policy may, and in some cases must, be considered. Where, for example, the issuance of a permit would result in objectionable dual operations by applicant as a common and contract carrier, this fact must be considered. Likewise, the relationship of the supporting shipper to the applicant may be an opponent's important objection to the proposed operation and would have to be dealt with from the standpoint of the public interest and our duty under the national transportation policy.

[fol. 51] Although applicant argues that denial will give U.S.A.C., a monopoly with respect to the traffic, it appears that there is only sufficient traffic to support one carrier's operation and that U.S.A.C. should be given an opportunity to transport it before a new carrier is permitted to enter the field. In the circumstances, we consider its argument as to monopoly to be without merit.

In our opinion nothing herein is inconsistent with the results obtained in the *Bass* decision or in *Schaffer Transportation Company* v. *United States*, supra cited by applicant in its pleadings. Rather than support for applicant's position the *Bass* decision is in accord with the findings made here. There the Court affirmed this Commission's denial of an application for contract carrier authority to perform a charter passenger service in which our action was based solely on the ground that existing common carriers could meet the needs of the public for charter service. Although the Court stated, *inter alia*, that there

is a duty to determine "whether the existing contract service is adequate" in a proceeding in which an applicant seeks authority to perform a "contract service," the Court apparently was referring to the peculiar characteristics of a charter bus service where a group collectively contracts for the exclusive use of certain equipment. In our opinion, the Court did not imply, as applicant suggests, that where contract carrier authority is sought this Commission must grant a permit where there is no contract carrier available to perform the service regardless of the existence of adequate common carrier service. We are of the further opinion that even though the decision of Division 1 in the *Bass* application was reached prior to the [fol. 52] 1957 amendments to the act, the conclusion reached by the Court that available common carrier service must be given consideration in an application for contract carrier authority continues to be valid.

In the *Schaffer case* the Supreme Court held that, when deciding an application for motor carrier operating authority, we must consider, among other things, the inherent advantages of the several modes of transportation. Contract and common carriage by motor vehicle are not separate modes of transportation but rather are subdivisions of the same mode, that is, motor transportation. Consequently where, as here, it appears that a motor common carrier is able to furnish a service substantially similar to that proposed by a motor contract carrier applicant, the *Schaffer* decision does not negate our long-continued policy of giving consideration to the effect on existing common carriers before approval is given to a grant of additional motor carrier authority, whether it be contract or common; nor do we believe it requires any different result from that reached here.

Therefore, we conclude in each proceeding, (1) that the character of shippers' transportation requirements is not such as to preclude their performance by a common carrier, (2) that U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application, (3) that in view of the adequacy of existing common carrier service the supporting shippers would not be materially affected by a denial of the applications, (4) that the potential loss of traffic to U.S.A.C. outweighs any

detriment to applicant, (5) that to authorize the proposed operations will not be consistent with the public interest [fol. 53] and the national transportation policy, and (6) that under the circumstances, both applications should be denied.

Findings

On reconsideration, in Nos. MC-11185 (Sub-No. 100) and MC-11185 (Sub-No. 102), we find that applicant has failed to establish that the proposed operations will be consistent with the public interest and the national transportation policy; and that each application should be denied.

An appropriate order will be entered.

Commissioner Freas concurs in the result.

Commissioner Walrath, concurring:

While I concur in the result reached by the majority, I would have preferred for the report to cover more fully the matter of services that a contract carrier must, under the amendments, now provide.

Commissioner Webb, concurring:

Weighing the five tests prescribed by Section 209(b) of the Act for determining whether a permit should be issued, I agree with the result reached by the majority. It seems to me, however, that the report prescribes a sixth test not authorized by the Congress and, in fact, a test considered by the Congress and deliberately rejected. The report seems to me to convey the impression that if an applicant for contract carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of Section 209(b) have been satisfied.

[fol. 54] What I call the sixth test prescribed by the report is the conclusion that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shipper's reasonable transportation requirements. The conclusion, in my opinion, is not supported by the language of Public Law 85-163 or by the pertinent legislative history.

When the bill (S.1384) which became Public Law 85-163 was introduced, it amended Section 203(a)(15) of the Act

so as to define a contract carrier as one who conducts its business other than as a common carrier and—

> "* * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*"

The Senate Committee on Interstate and Foreign Commerce deleted the language italicized above. In addition, the Committee eliminated from the bill the requirement of a showing under Section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the Committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers." As thus amended, the bill was enacted into law.

Obviously, there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted [fol. 55] that language solely because it required an impossible burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in Section 203(a)(15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in Section 209(b) "that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown."

Contract carriers opposed the bill as originally introduced on the ground that to require proof as to the nonexistence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public convenience and necessity standard in Section 209 proceedings disappeared when under the new law, permits ceased to be unrestricted licenses for hunting traffic. As I see it, the report attempts to write into Sections 203(a)(15) and 209(b) language

deliberately stricken by the Congress. The report converts compromise legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating legislative defeat for contract carriers.

Commissioner McPherson dissenting:

On reconsideration I now conclude that the applications should be granted.

Shippers require a service in which vehicles are assigned to them for their exclusive use for continuing periods of time. The protestants hold authority which is broad enough. However, the question is not restricted merely to the holding of appropriate authority, but also embraces [folo. 56] the service which the shippers require. The specialized service required by these shippers is within the definition of contract carriage.

In weighing the effect a grant of denial would have upon the services of the protestant, and the applicant, and/or the shipper, I would decide in favor of a grant in these particular cases.

Commissioners Mitchell, Arpaia and Winchell did not participate.

[fol. 57] Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 15th day of June—A.D. 1959.

No. MC-11185 (Sub-No. 100)

J-T Transport Company, Inc., Extension—Columbus, Ohio

No. MC-11185 (Sub-No. 102)

J-T Transport Company, Inc., Extension— Indianapolis, Ind.

It appearing, That on January 31, 1958, the Commission, division 1, entered its consolidated report, 74 M.C.C. 324, and order in the above-entitled proceedings denying the said applications;

It further appearing, That upon consideration of the

record, and of the second petition of the applicant for reconsideration, and of the reply thereto by U.S.A.C. Transport, Inc., and for good cause shown, by orders entered November 5, and October 16, 1958, respectively, the proceedings were reopened for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved in these proceedings has been given, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the said report of January 31, 1958, are hereby referred to and made a part hereof:

It is ordered, That the said applications be, and they are hereby, denied.

By the Commission.

Harold D. McCoy, Secretary.

[Seal.]

[fols. 58-79] Appendix "E" to Complaint

Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 16th day of October, A.D. 1958.

J-T Transport Company, Inc., Extension— Indianapolis, Ind.

Upon consideration of the record in the above-entitled proceeding, and of the second petition of the applicant for reconsideration, tendered for filing on September 2, 1958, and of a reply by U.S.A.C. Transport, Inc.; and good cause appearing therefor:

It is ordered, That the said second petition for reconsideration be, and it is hereby, accepted for filing.

It is further ordered, That the order heretofore entered herein on July 25, 1958, insofar as it denied petitions for reconsideration, be, and it is hereby, vacated and set aside.

And it is further ordered, That the said proceeding be,

and it is hereby, reopened for reconsideration on the present record, for the issuance of a further report and order of the Commission.

By the Commission.

[SEAL.] Harold D. McCoy, Secretary.

[fol. 80] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DEFENDANT'S ANSWER—FILED OCT. 20, 1959

The United States of America and the Interstate Commerce Commission (the latter hereinafter called the Commission), defendants in this action, answer the complaint of the plaintiff as follows:

1

Admit the allegations contained in Part I of the complaint.

2

Admit the allegations contained in Part II of the complaint, except that the defendants deny those portions of the second (unnumbered) subparagraph which allege that since the 5th day of August, 1957, the plaintiff has held temporary authority from the Commission in Docket No. MC-11185 (Sub-No. 103TA), and that upon the filing of the complaint of the plaintiff it may continue to perform [fol. 81] transportation which had been authorized in its Sub 103TA docket pending final adjuication of the issues presented in the complaint, and on the contrary the defendants allege that, pursuant to Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b)), the Commission's Special Rules of Procedure for Temporary Operating Authorities (49 C.F.R. 2.2(f)(1)(i)), and the Commission's General Rules of Practice (49 C.F.R. 1.101 (e)), the plaintiff's temporary authorization in its Docket No. MC-11185 (Sub-No. 103TA) ceased to be in force and effect on and after July 25, 1959, and any transportation of the commodities in question from and to the points in question performed by the plaintiff after the date last mentioned has been performed without any legal warrant whatsoever.

Admit the allegations contained in Part III of the complaint, except that (1) with respect to the subsection of the Interstate Commerce Act cited in the first (unnumbered sub-paragraph, the defendants aver that the correct citation is "Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a)," and the defendants deny those portions of such first (unnumbered) sub-paragraph which allege that the plaintiff has been continuing to perform the involved transportation under color of a temporary authorization by the Commission, and they deny the allegation that upon the filing of the plaintiff's complaint it may continue to perform such transportation, and on the contrary the defendant's allege that such temporary authorization ceased to be in force and effect on and after July 25, 1959, for the reasons specified in Paragraph 2 of this answer; (2) with respect to the date of filing of the recom-[fol. 82] mended report and order of the examiner, recited in the third (unnumbered) subparagraph, the defendants aver that such report was filed on July 16, 1957; (3) with respect to the report and order of Division 1 of the Commission, handed down on January 31, 1958, as recited in the ninth (unnumbered) subparagraph, the defendants deny that in rendering such report and order, Division 1 acted as an Appellate Division of the Commission within the meaning of that term as used in Section 17 of the Interstate Commerce Act, 49 U.S.C. 17, and the court is informed that the report of January 31, 1958, was officially published in 74 M.C.C. 324; (4) the defendants deny the implication contained in the seventeenth (unnumbered) paragraph that the reason for the issuance of the order of the Commission of October 16, 1958, (Appendix "E" to the complaint) was the issuance by Division 1 of the Commission of a report in another proceeding which appeared, upon the face thereof, to be diametrically opposed, in material respects, to the report of the Commission of January 31, 1958, (Appendix "B" to the complaint); and (5) with respect to the report and order of the Commission of June 15, 1959, (Appendix "D" to the complaint), recited in the twentieth (unnumbered) subparagraph, the Court is informed that such report was officially published in 79 M.C.C. 695; these defendants deny that the application in

plaintiff's Docket No. MC-11185 (Sub-No. 102) was denied in the report of June 15, 1959, upon the same grounds contained in the report of Division 1, of January 31, 1958; and they deny the characterization that the report of June 15, 1959, constitutes nothing more nor less than an extended argument in support of an effort to bolster the report and order of January 31, 1958, and they respectfully refer the court to the report of June 15, 1959, for [fol. 83] the proper interpretation thereof.

4

Deny the allegations contained in Parts IV and V of the complaint.

5

For further answer to the complaint, the defendants allege that all of the parties to the proceeding before the Commission were given a full and complete hearing; that the findings and conclusions in the reports and orders attacked in the complaint were and are fully supported and justified by the evidence submitted in said proceeding; that in making such reports and orders the Commission carefully considered and applied the criteria fixed by law, considered and weighed carefully the National Transportation Policy, considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition required by law to be considered, and weighed as well each fact, circumstance and condition called to its attention by the parties to said proceeding by their respective counsel or otherwise; that said reports and orders were not made or entered unreasonably, arbitrarily, capriciously, or in abuse of its discretion; that in making said reports and orders, the Commission did not exceed the authority conferred upon it by law; and, except as expressly admitted in this answer, the defendants deny each and every allegation contained in the complaint.

Wherefore, having fully answered, the United States of America and the Interstate Commerce Commission, defendants, pray that the relief sought in the complaint be dismissed, and that judgment be entered for the de- [fol. 84] fendants, with costs against the plaintiff.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.

Robert A. Bicks, Acting Assistant Attorney General. Edward L. Scheufler, United States Attorney, Western District of Missouri, Kansas City, Missouri, Attorneys for the United States of America.

James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert W. Ginnane, General Counsel.

[fol. 84-a] INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

CERTIFICATE OF SECRETARY OF INTERSTATE COMMERCE COMMISSION

I, HAROLD D. McCOY, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Application filed March 14, 1957 on Form B.M.C. 78,

Transcript of the stenographer's note of hearing held May 22, 1957 at Denver, Colorado, and exhibits 1 to 26, both inclusive, filed at said hearings,

Exceptions of Class I Rail Carriers, filed August 12, 1957,

Exceptions of U.S.A.C. Transport, Inc., filed August 14, 1957,

Reply of Applicant, filed September 17, 1957,

Petition of Applicant for Reconsideration, filed April 15, 1958,

Second Petition of Applicant for Reconsideration, filed September 2, 1958, and

Petition to Intervene of Common Carrier Conference-Irregular Route, filed November 5, 1958,

in Docket No. MC-11185 (Sub-No. 102), J-T Transport Company Extension—Columbus, Ohio, and

Petition to Intervene of Contract Carrier Conference, filed April 15, 1958,

Petition for Reconsideration of Contract Carrier Conference, filed April 15, 1958,

Reply of U.S.A.C. Transport, Inc., filed May 13, 1958,
Petition to Intervene of Regular Common Carrier Conference, filed November 7, 1958,

Reply of Regular Common Carrier Conference, filed November 7, 1958, and

Reply of Applicant, filed November 17, 1958,

in Docket No. MC-11185 (Sub-No. 1003), J-T Transport Company, Inc., Extension—Columbus, Ohio, and Docket No. MC-11185 (Sub-No. 102), J-T Transport Company, Inc., [fol. 84b] Extension—Columbus, Ohio, the originals of which are now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 10th day of February, A. D. 1960.

HAROLD D. McCOY, Secretary of the Interstate Commerce Commission.

[fol. 85] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-11185 (Sub-No. 102)

In the Matter of the Application of J-T TRANSPORT COMPANY, INC., 3501 Manchester Trafficway, Kansas City, Missouri, Contract Carrier, Irregular Route

Stenographer's Minutes

Room 37, New Custom House, Denver, Colorado
Wednesday, May 22, 1957.

Met pursuant to notice, at 9:30 a.m.

Before: Leo W. Cunningham, Examiner.

APPEARANCES:

James W. Wrape, Attorney at Law, Sterick Building, Memphis, Tennessee, appearing for the applicant.

Douglas McHendrie, Attorney at Law, 730 Equitable Building, Denver 2, Colorado, appearing for Class I Rail Carriers, in Western Trunk Line Territory, Protestants.

Paul F. Sullivan, Attorney at Law, 1821 Jefferson Place, N. W. Washington, D. C., appearing for U.S.A.C. Transport, Inc., Protestant.

Ernest A. Brooks, II, Attorney at Law, 1301 Ambassador Building, St. Louis, Missouri, appearing for Ace Doran Hauling & Rigging Co., Daniel Hamm Drayage Co., A. L. Jeffries Trucking Co., Niman Transfer & Storage Co., Taylor Heavy Hauling Co., and Belger Cartage Service, Inc., protestants.

[fol. 86] PROCEEDINGS

Exam. Cunningham: The hearing will come to order. The rules of the Interstate Commerce Commission prohibit smoking in the hearing room at any time.

The Interstate Commerce Commission has set for hearing at this time and place before Examiner Leo Cunningham docket No. MC-1185, Sub-No. 102. filed March 14, 1957, in the matter of the application of J-T Transport Company, Inc., 3501 Manchester Trafficway, Kansas City, Missouri, for authority to operate as a contract carrier, over irregular routes, transporting: aircraft assemblies, uncrated, requir-

ing special handling and equipment, because of fragile nature, from Indianapolis, Indiana, to Wichita, Kansas.

Who appears for the applicant?

Mr. Wrape: Mr. Examiner, my name is James W. Wrape, Sterick Building, Memphis, Tennessee. I am an attorney and admitted to practice before the Interstate Commerce Commission. I appear for the applicant.

Exam. Cunningham: Who represents the protestants?

Mr. Brooks: My name is Ernest A. Brooks. I am an attorney and licensed to practice before the Interstate Commerce Commission. I represent Daniel Hamm Drayage Company of St. Louis, Missouri, and other carriers listed on the appearance blank.

Mr. Sullivan: Paul F. Sullivan, 1821 Jefferson Place, [fol. 87] Washington, D. C., appearing for U.S.A.C. Transport, Inc., protestant.

Mr. McHendrie: Douglas McHendrie, 730 Equitable Building, Denver, Colorado; I am an attorney and registered practitioner with the Commission. I am appearing for Class I Rail Carriers, in Western Trunk Line Territory, protestants.

Exam. Cunningham: Have all parties notified the applicant and the Commission ten days prior to the hearing that they intended to appear and their position?

Mr. Wrape: They have, sir.

Exam. Cunningham. Do you have any statement you wish to make?

Mr. Wrape: No, sir, call Mr. Cooper.

Tom R. Cooper, was sworn and testified as follows:

Direct examination.

By Mr. Wrape:

Q. Give your full name, sir.
A. My name is Tom R. Cooper.
Q. Where do you live, Mr. Cooper?
A. I live at 6542 Wenonga Road, Kansas City, Missouri.
Q. With whom are you connected?
A. I am connected with the J-T Transport Company, Inc.
Q. That is the applicant here?

A. Yes, sir.

Q. What position do you hold with that company?

[fol. 88] A. I am the president.

Q. And in what business is it engaged?

A. It is engaged in the business of transporting airplane components?

Q. And is that its sole business?

A. Yes, sir.

Q. And its principal office is where?

A. Its principal office is 3501 Manchester Road, Kansas City, Missouri.

Q. How long has it been engaged in that business?

A. It has been engaged in this business since 1941.

Q. And have you been connected with it all of that time?

A. Yes, sir.

Q. Who are the other officers of that company?

A. The other officers are Jack Cooper, Jr., vice-president, Mr. H. W. Pearson, secretary.

Q. And who are the directors?

A. The directors are Jack Cooper, H. W. Pearson, Jane Cooper, Virginia Cooper, and Tom Cooper.

Q. Who are Jane and Virginia Cooper?

A. Jane and Virginia Cooper, Virginia is Jack Cooper's wife, and Jane Cooper is Tom Cooper's wife.

Q. Who owns the stock in that company?

A. Jack Cooper, Virginia Cooper, Jane Cooper, and Tom Cooper.

Q. In equal amounts?

[fol. 89] A. It is owned forty-nine shares by Jack Cooper, forty-nine shares by Tom Cooper, one share by Jane Cooper, and one share by Virginia Cooper.

Q. Now, are you connected with any other motor carrier?

A. Yes, sir.

Q. And what are the names of such carriers?

A. Jack and Tom Cooper doing business as J-T Transport Company. That is a partnership.

Q. Where is the location of that business?

A. It is at Kansas City, Missouri.

Q. And is it a common or contract carrier?

A. It is a common carrier.

Q. And what business does it do?

A. It is in the business of transporting new automobiles from Detroit to Kansas City, Missouri and Wichita, Kans.

Q. And is it engaged exclusively in the transportation of automobiles?

A. Yes, sir.

Q. And do you and your brother Jack Cooper own that company in equal amounts?

A. Yes, sir.

Q. Now, are you connected with any other motor carrier?

A. Yes, sir, Jack Cooper Transport Company, Inc.

Q. And where is its principal office?

A. Its principal office is 3936 Ewing, Kansas City, Missouri.

[fol. 90] Q. And is that a common or a contract carrier?

A. That is a contract carrier.

Q. It is a contract carrier?

A. Yes.

Q. Of automobiles?

A. Yes.

Q. And is it engaged exclusively in the transportation of automobiles?

A. Yes, sir.

Q. Does it have a single customer?

A. Yes, sir.

Q. And who is that?

A. Chevrolet Division of General Motors.

Q. Now, I think I forgot to ask you how long has the partnership been engaged in transporting automobiles as a common carrier?

A. The partnership has been engaged in the transporting of automobiles since 1939.

Q. And Jack Cooper Transport Company, Inc., has been engaged in the transportation of automobiles for how long?

A. Since 1929.

Q. Now, who are the other officers of Jack Cooper Transport Company, Inc.?

A. Jack Cooper, Jr. is the president, Tom Cooper is the vice-president, H. W. Pearson is the secretary, Mr. E. D. Weeks is a vice-president and a director; Mrs. E. D. Weeks is a vice-president and a director.

[fol. 91] Q. And who are Mr. and Mrs. Weeks?

A. Mrs. Weeks is my sister; Mr. Weeks is her husband.

Q. And who owns Jack Cooper Transport Company, Inc., the stock in it?

A. The stock in Jack Cooper Transport Company, Inc. is owned in equal shares by Jack Cooper, Jr., Mrs. E. D. Weeks, and Tom Cooper.

Q. Now, does the J-T Transport Company, the partnership, or Jack Cooper Transport Company, Inc., serve any customer that is served by the applicant here?

A. No, sir.

Q. Now, has the question of the dual control of the three companies by you and your brother been before the Commission before?

A. Yes, sir, several times.

Q. In each instance where you have had an extension, isn't that correct, sir?

A. Yes, sir.

Q. And has the Commission approved that dual control?

A. Yes, sir, they have.

Q. Now, for whom would you perform the service that is here proposed?

A. This service would be for Boeing Airplane Company.

Q. And the applicant is a contract carrier?

[fol. 92] A. Yes, sir.

Q. Does the applicant at the present time have contracts on file with the Commission covering transportation for Boeing?

A. Yes, sir.

Q. And is it true, sir, that if the permit sought here is granted it would simply be an additional operation for a company for whom you presently have contracts?

A. Yes, sir.

Q. Has there been any change in the management or the ownership of stock or control in the three companies since approval was first granted for the dual control?

A. No, sir, there has not.

Q. Now, what do you propose in this application?

A. In this application we propose to transport airplane parts uncrated requiring special equipment and handling because of the fragile nature of the commodities.

Q. Between what points?

A. Between Indianapolis, Indiana and Wichita, Kansas.

Mr. Sullivan: That isn't what the application says.

Mr. Wrape: What does the application say?

Mr. Sullivan: The application states "aircraft assemblies." He said "between"; the application says "from" and "to".

The Witness: I am sorry.

Mr. Wrape: Let's get him straight, Mr. Sullivan; he gets out of hand every once in a while.

[fol. 93] By Mr. Wrape:

Q. Is it a "from" operation?

A. Yes.

Q. From where?

A. From Indianapolis, Indiana, to Wichita, Kansas.

Q. And is it an aircraft part that is a component or an assembly of an airplane that you propose to transport?

A. Yes, sir.

Q. Now, are you familiar with that part that you propose to transport?

A. Yes, sir.

Q. And are you transporting it at the present time?

A. Yes, sir.

Q. And that is by reason of temporary authority?

A. Yes, sir.

Q. Now, I believe, Mr. Cooper, that you have prepared an exhibit which reflects the present operating authority of your company?

A. Yes, sir.

Mr. Wrape: May this multiple page document be marked for identification as exhibit 1?

Exam. Cunningham: It will be identified as exhibit 1.

(Document was marked applicant's exhibit No. 1, Witness Cooper, for identification.)

Q. You have before you, Mr. Cooper, what has been marked for identification as exhibit 1. What is it?

[fol. 94] A. Exhibit 1 are the different permits and temporary authorities that J-T Transport Company, Inc. is operating under.

Q. Does that include a copy of the order of temporary authority?

A. Yes, sir, it does.

Q. And when was the order of temporary authority granted?

A. It was granted April 9th 1957.

Q. Was there an emergency order prior to that?

A. Yes, sir.

Q. Now, I believe you told us that you and your brother also do business as a partnership under the name and style of J-T Transport Company as a common carrier. Have you caused to be prepared copies of the certificate issued to the partnership?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 2?

Exam. Cunningham: It will be identified as exhibit 2.

(Document was marked applicant's exhibit No. 2, Witness Cooper, for identification.)

Q. You have before you, Mr. Cooper, what has been marked for identification as exhibit 2. Tell us what that is.

A. Exhibit 2 is the certificate of public convenience and necessity of Jack Cooper, Jr. and Tom Cooper, a partnership doing business as J-T Transport Company.

Q. Now, did you likewise prepare a copy of the permit issued to Jack Cooper Transport Company, Inc.?

[fol. 95] A. Yes, sir.

Mr. Wrape: May this one page document be marked as exhibit 3?

Exam. Cunningham: It will be identified as exhibit 3.

(Document was marked applicant's exhibit No. 3, Witness Cooper, for identification.)

Q. I will hand you what has been marked for identification as exhibit 3. Tell us what that is.

A. Exhibit 3 is the permit, Interstate Commerce Commission permit of Jack Cooper Transport Company, Inc.

Q. Now, is the partnership and the Jack Cooper Transport Company, Inc. conducting the operations that are shown on exhibits 2 and 3?

A. Yes, sir.

Q. Now, have you caused to be prepared here an exhibit which describes the equipment operated by your company?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 4?

Exam. Cunningham: It will be identified as exhibit 4.

(Document was marked applicant's exhibit No. 4, Witness Cooper, for identification.)

Q. You have before you what has been marked for identification as exhibit 4. Tell us what it is.

A. Exhibit 4 is the equipment list of J-T Transport Company, Inc.

[fol. 96] Q. What do you show on this exhibit?

A. On this exhibit at the top it shows the various tractors owned and operated by J-T Transport. The next group is the group of special trailers that are owned and operated by J-T Transport. These particular trailers are all metal construction, with semi-underslung floors. They have special doors to open full width. They have tracks built into the trailers for loading and unloading the components.

They have special jigs, fixtures, that are built into each trailer for each particular type of load.

The next group of trailers are all metal construction; they are frameless; they are underslung. The inside floor of the trailer has a twelve-inch clearance from the road. The roof consists of either two or three doors that are hinged on one side and open completely up for loading and unloading with overhead cranes.

Each of these different groups of trailers has different jigs and fixtures built to haul specific items.

Q. Now, with respect to the tractors, let's take the first line. Does that mean you have one 1948 two and a half ton Dodge with the cab-over-engine?

A. Yes, sir.

Q. Let's get to the trailers. The number 304, the first trailer; what is that number?

[fol. 97] A. That is just the unit number.

Q. Is that your company accounting number?

A. That's right.

Q. Now, the next column is what?

A. That is the company that built the trailer.

Q. And the next column?

A. The next column shows where these particular trailers are in operation from. For example, Grand Prairie, Texas to Witchita, Kansas, and the next column shows who the operation is being conducted for.

Q. To read across would that mean that your trailer unit 364 was manufactured by Spencer and operates from Grand Prairie, between Grand Prairie and Witchita for Boeing?

A. Yes, sir.

Q. Have you prepared a balance sheet statement as of April 30 for submission here?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 5?

Exam. Cunningham: It will be identified as exhibit 5.

(Document was marked applicant's exhibit No. 5, Witness Cooper, for identification.)

Q. You have exhibit 5 before you. Tell us what it is.

A. Exhibit 5 is the balance sheet of J-T Transport Company, Inc. as of April 30th 1957.

[fol. 98] Q. Are you familiar with that statement?

A. Yes, sir.

Q. Does it correctly reflect the condition of your company as disclosed by your books on that date?

A. Yes, sir, it does.

Q. Have you prepared for submission here a statement of income and expense?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 6?

Exam. Cunningham: It will be identified as exhibit 6.

(Document was marked applicant's exhibit No. 6, Witness Cooper, for identification.)

Q. You have before you exhibit 6. Tell us what it is.

A. Exhibit 6 is an income statement of J-T Transport Company, Inc., from January 1st to April 30th 1957.

Q. Are you familiar with that statement?

A. Yes sir.

Q. Does it correctly reflect your operations as disclosed by your books for that period?

A. Yes, sir, it does.

Q. Tell us where you have terminals.

A. We have terminals at Kansas City, Missouri, Wichita, Kansas, and Grand Prairie, Texas.

[fol. 99] Q. And what was the purpose of the Kansas City terminal?

A. Well, the Kansas City terminal has headquarters where our books are kept, where our office operation is conducted.

Q. And what about the Witchita terminal?

A. The Wichita terminal is where our trailers, our jigs and fixtures are built, where the biggest part of our operation is conducted from.

Q. And would you describe that terminal for us?

A. Well, it is a concrete block building; it is a normal garage other than having extra-high doors, because some of our equipment is over height. It has a complete shop for repairing trucks and trailers. It also has a metal working shop where the majority of our jigs and fixtures are built.

Q. And the personnel that are located there?

A. The personnel are our Wichita manager, our mechanics, office girl, and drivers.

Q. Now, Mr. Cooper, under the temporary authority from what plant do you transport the commodity that is here involved?

A. The commodity being transported is transported from the H. & B. American Machine Company at Indianapolis.

Q. Now, is there any particular problem involved in the loading at their plant?

A. Well, on this particulr operation we had quite a problem. The part to be transported is a little over eleven feet high. It is about ten and a half feet long, about two feet wide. The problem was that the part had to be transported [fol. 100] with the eleven-foot dimension directly up and down.

Q. You mean upright?

A. Upright; to keep the equipment legal through the states it was operating we had to have a frameless underslung trailer. Then we found that at H. & B. they did not have overhead crane facilities available for loading these

parts, so we had to design an elevator built in the trailer, which is an electric elevator with gears, and operates with cables which raise a false floor or an elevator floor from the underslung part of the trailer up even to the rear wheels, so that a part can be rolled in or out.

Then to take care of the fact that they didn't have an overhead crane, and using our metal roofs we had to have the roof fastened directly to the elevator floor so that as the elevator raised up and the part on it raised up the roof would also raise up, so that the part would not touch.

Q. In other words, from the floor to the roof there is more than eleven feet in clearance?

A. That's right.

Q. All right; go ahead.

A. Then to load these parts at H. & B. it was necessary to design a fork truck with tracks built on the fork truck which the component could be affixed to. The fork truck would be driven to the back of the trailer, lifted to the trailer level into the trailer, rolled with the elevator into [fol. 101] place, and fastened down.

Q. And you say that you have transported the involved commodities in the trailer of that design?

A. Yes, sir, we have.

Q. Now, who designed the trailer?

A. The trailer was designed by J-T Transport.

Q. Now, do you handle these parts crated or uncrated?

A. These parts are handled uncrated.

Q. And do you transport them in a shipping fixture?

A. It is transported in a special shipping fixture.

Q. Who designed the shipping fixture?

A. The shipping fixture was designed by J-T Transport with Boeing Airplane Company's engineer's approval after the fixture was designed.

Q. And have you found the use of the fixture that you designed and the trailer that you utilize to be a feasible way of transporting the involved commodity?

A. Yes, sir, it was; it has worked very well.

Q. Have you had any damages.

A. No, sir.

Q. Now, what is the commodity made of?

A. The commodity is made of aluminum, magnesium and titanium.

A. And is it fragile and delicate?

A. Yes, sir, it is.

Q. Is it susceptible to damage?

[fol. 102] A. It is very easily susceptible to damage.

Q. Is it susceptible to strain and stress?

A. Yes, sir, it is.

Q. Now, do you have a picture of the trailer?

A. Yes, sir.

Mr. Wrape: May this picture be marked for identification as exhibit 7?

Exam. Cunningham: It will be identified as exhibit 7.

(Photograph was marked applicant's exhibit 7, Witness Cooper, for identification.)

Q. Now, you have before you what has been marked for identification as exhibit 7. Would you tell us, explain it to us, what it is.

A. Well, this is a rear-view picture of the trailer that is used in the operation from Indianapolis to Wichita. It is setting at the Boeing dock. This track, of course, is a portable track. It shows the track going into the trailer. It shows in the floor of the trailer the elevator floor at the raised position.

At the top of the picture it shows the roof of the trailer raised to the full position, and to the front, extreme front of the trailer, you can see the electric motor mechanism that raises and lowers the elevator.

Q. Now, when that false floor is lowered into the underslung portion, what happens to the roof?

[fol. 103] A. As the floor lowers the roof lowers. It is fastened permanently to the false floor so that it goes up and down as the floor goes up and down.

Q. Now, there appears to be a wide member extended from side to side of the trailer that seems to be below the roof. What is that?

A. That is the cross-member which is on hinges and opens for loading and unloading. In this particular picture they didn't have the member open.

Q. In other words, that would swing out on hinges?

A. That would swing out on hinges.

Q. And then the distance from the false floor to the roof is how much?

A. The distance is about eleven and a half feet.

Q. Now, do you have a picture of commodity loaded into the trailer?

A. Yes, sir; loaded into the trailer?

Q. Yes, sir.

A. Yes.

Q. And is the commodity in this picture in the shipping jig?

A. Yes, sir, it is.

Mr. Wrape: May this picture be marked for identification as exhibit 8?

Exam. Cunningham: It will be identified as exhibit 8.

[fol. 104] (Photograph was marked applicant's exhibit No. 8, Witness Cooper, for identification.)

Q. Now, I will hand you what has been marked for identification as exhibit 8. Tell us what that is.

A. Exhibit 8 is a rear view of the trailer at the Boeing dock. It shows the doors open. It shows the upper cross-member open. It shows the parts on the trailer with the elevator in a raised position and the roof in a raised position. It also shows the fixtures.

Q. Now, I notice some tracks or something directly in the middle of the fixture. What are they for?

A. The tracks?

Q. Yes.

A. The tracks are what the fixture rolls in and out of the trailer on to keep them exactly in line so they won't touch the sides or be damaged.

Q. And does the fixture move in the trailer over the highway on the tracks?

A. Yes, sir, it does.

Q. Now, was there any problem with respect to the casters?

A. The casters, because of the fire hazard it was necessary to use a special textile wheel that does not spark; there is no fire danger from it.

Q. And the caster is made of what?

A. It is made of a textile.

[fol. 105] Q. Cloth, you mean?

A. Yes, sir, and because of the weight of the parts and the fixture it again took a special caster that would stand

the weight and the transportation to keep the caster from tearing down under operation.

Q. Now, in exhibit 8 can you see the tie-downs, any of them?

A. Yes, sir, the tie-downs, there are two cables at the rear of each fixture. These tie-downs are unfastened now ready for the parts to be rolled out. At the front of the fixture, which we can't see, are more tie-downs to hold it from moving forward or backward.

Q. Now, in exhibit 7 can you see the motor that works the elevator?

A. Yes, sir, you can.

Q. Is that up in the front part of the trailer, the nose of the trailer?

A. Yes, sir, the motor, the reduction gear and so on to work the cables.

Q. Now, do you have a picture of the fixture lowered into the underslung portion of the trailer and with the roof down?

A. Yes, sir.

Mr. Wrape: May this picture be marked for identification as exhibit 9?

Exam. Cunningham: It will be identified as exhibit 9.

[fol. 106] (Photograph was marked applicant's exhibit No. 9, Witness Cooper, for identification.)

Q. Tell us about exhibit 9.

A. Exhibit 9 shows the fixture in the trailer. One fixture is loaded with bulkheads. The other fixture is temporary. It shows the fixtures lowered completely into shipping position. It shows the roof in place. The top cross-member has not been put in place. The tracts, the portable tracts, have not been put in the trailer yet.

Q. Now, do you have a picture of the assembly in the shipping fixture?

A. Yes, sir.

Mr. Wrape: May this picture be marked for identification as exhibit 10?

Exam. Cunningham: It will be identified as exhibit 10.

(Photograph was marked applicant's exhibit No. 10, Witness Cooper, for identification.)

Q. I will hand you what has been marked for identification as exhibit 10. Tell us what it is.

A. Exhibit 10 shows two of the shipping fixtures in Boeing Airplane Company's plant. It shows several people standing beside it, which will give you an idea of the height of it.

Q. Are those people midgets?

A. No, sir.

Q. Normal-sized people?

[fol.107] A. Yes, sir.

Q. Is one of them Mr. Solomon?

A. I believe that's Mr. Solomon with his back to us.

Q. I think he has more hair than that, Mr. Cooper. What are the shipping fixtures manufactured of?

A. The shipping fixtures are manufactured of steel.

Q. Now, do you know how many loads you have transported so far?

A. I believe we have transported fourteen loads.

Q. And have you had any claim for damages?

A. No, sir, we have not.

Q. And what is your ordinary time in transit?

A. Our transit time runs about thirty hours.

Q. Now, this piece of equipment that you have identified here, is that used for the transportation of any other assembly for any other shipper?

A. No, sir, it is not, and it could not. It is designed specifically to haul these particular parts, and the way the part fastens it would be good for nothing other than transporting these particular parts.

Q. And how many of such units do you have at the present time?

A. Of the shipping fixtures?

Q. No, of the trailers?

A. At this time we are operating one truck.

Q. Would you identify this particular unit on exhibit 4?

[fol. 108] A. This trailer is trailer number 338.

Q. It's a Spencer unit that is operated from Indianapolis to Wichita for Boeing?

A. That's right.

Q. Now, do you perform this operation on a schedule, or how?

A. We perform this operation at exactly the time Boeing

Airplane Company tells us to. Our equipment is available standing waiting at Wichita for Boeing to instruct us as to when to pick the parts up.

Q. And at Indianapolis do you perform the loading, or does the manufacturer there?

A. The manufacturer performs the loading with our driving, watching and giving instructions in case of any new people on exactly how it is to be put in and how it is to be fastened down.

Q. And what about the unloading?

A. The unloading is done by Boeing Airplane Company.

Q. And you say this piece of equipment is exclusively dedicated to Boeing and is operated at their call and demand?

A. Yes, sir.

Mr. Sullivan: That's a trifle leading, Mr. Wrape.

Mr. Wrape: I will summarize it, Mr. Sullivan; I agree with you it was a little leading.

Q. Now, does your company have a contract with Boeing covering the temporary operation?

[fol. 109] A. Yes, sir, we do.

Q. And in the event the permanent permit is granted will you enter into a contract with accordance with the Commission's rules and regulations?

A. Yes, sir.

Q. Will you tell the examiner whether or not in your opinion you can continue to perform this operation in compliance with the Commission's rules and regulations?

A. Yes, sir, we can.

Q. And will you give him your opinion as to whether or not you can continue to transport the involved commodity expeditiously and without damage?

A. Yes, sir, we can.

Mr. Wrape: I will offer the exhibits and tender the witness.

Exam. Cunningham: Any objections to exhibits 1 through 10?

Mr. Brooks: I have none.

Mr. Sullivan: No.

Exam. Cunningham: Exhibits 1 through 10 will be received then.

(Applicant's exhibits Nos. 1 through 10, Witness Cooper, for identification, were received in evidence.)

Cross-examination.

By Mr. Brooks:

Q. Mr. Cooper, what is the weight of the assembly for which you gave the dimensions eleven feet high, ten and a [fol. 110] half feet long, two feet wide?

A. The weight on one piece is 1200 and some pounds, and the other is 1300 and some pounds. You have a total load of less than—as I remember, it is 5500 pounds.

Q. I see; whose fork lift truck is used at the plant of the H. & B. American Machine Company at Indianapolis which you said is utilized to load these articles?

A. Well, I am giving an opinion. I think it is H. & B.'s; it is not ours.

Q. That's what I wanted to get at, whether or not it is your equipment.

A. No, sir, it is not.

Q. Now, has the same driver of the J-T Transport Company handled all fourteen of the loads which have been handled from Indianapolis to Wichita?

A. I believe it has been two different drivers.

Q. You do not have one driver only assigned to this particular movement?

A. Yes, sir, we do, but I believe that he was sick for about a week or ten days.

Q. I see. Now, sir, your company operates low-bed equipment in addition to the equipment used here as shown in exhibits 7 through 10, do you not?

A. We have a lot of underslung equipment, but all of our equipment is completely enclosed. We don't have any what you would call open low-boy trailers at all.

[fol. 111] Q. I see. Sir, would the articles sought to be transported here be capable of moving over the highways because of the height on a low-bed trailer?

A. Not and be in legal height. A low-bed trailer, a low-boy trailer, a floor is about two feet to three feet high, and to transport this part legally you have got to have an inside floor of about twelve inches.

Q. Twelve what?

A. Twelve inches high from the road.

Q. Twelve inches high from the road?

A. Yes, sir.

Q. So that the eleven feet plus the roof would not be too high to get under the bridges?

A. That's right.

Q. Do you use any over-height permits on this particular movement?

A. No, we do not; this unit is thirty-five feet long and twelve foot-six high.

Q. Have you checked the highway or checked to determine whether or not it would be feasible to obtain over-height permits and thereby haul it on higher equipment without this elevator?

A. Well, no, sir, we have found that anytime that we can get and transport a part in legal equipment, that the various highway departments will not give us over-height permits.

[fol. 112] Q. Had you sought any over-height permits when you first got this temporary authority?

A. No, sir, we didn't need them.

Q. Did you already have this piece of equipment built at the time you got the temporary authority?

A. Yes, sir.

Q. Now, how long have you had the temporary authority, sir? Is that April 9th 1957?

A. That would be when the temporary authority started, yes, sir. There was an emergency authority, I believe, before that.

Q. Oh, I see; so how long have you had either temporary or emergency authority thus far?

A. Well, I believe it is a little over three and a half to four months.

Q. I see, sir. Is it profitable economically to transport fourteen shipments in one vehicle from Indianapolis to Wichita over a period of four months dedicating an entire piece of equipment to that movement alone?

A. Mr. Brooks, we have been in the habit of making a profit in our operations in every operation we have, and it is this general type of operation.

Q. I appreciate that, but I am asking you here if fourteen movements in four months dedicating one entire unit to the movement—

A. We think so.

[fol. 113] Q. —is in your opinion an economic, economically good for your company?

A. We think so.

Q. And I understand that the equipment otherwise waits around at Witchita subject to the call of Boeing?

A. Yes, sir, it does.

Q. Is there any guaranteed amount of tonnage in your contract from Boeing?

A. Yes, sir there is a guarantee over a period of a year.

Q. Is there anything about this equipment that you know of that would prevent it from being transported in an open trailer; that is, without sides or top?

A. Yes, sir, the parts are very easily damaged; they are more or less susceptible to water and dirt. There are bearings that are involved. We have found over a period of years that we have been transporting these parts that it is definitely a much safer operation to transport them in completely enclosed trailers.

Q. Well now, sir, the bearings you speak of, and looking at exhibit 10, are all encased in a waterproof paper or cloth as shown, is that not correct?

A. Well, I don't know that it is waterproof. The bottom bearings are covered, the bearings that you can see at about the middle of the part are in the open.

Q. Who built and paid for these racks which you see in [fol. 114] exhibits 8, 9, and 10 that are holding the component assemblies?

A. J-T Transport built, designed and paid for the racks that are used in the trailers.

Q. I see. How many racks have you built?

A. We have four racks for the trailer. On top of that I believe we have built another four racks that Boeing is using and that Boeing paid for. In other words, when the parts come to Boeing one rack is rolled out of the trailer and an empty rack is rolled in to facilitate the speed of the loading.

Q. Only two can be transported in a trailer at one time?

A. No, sir, it is four. The picture doesn't show too good. As the elevator goes down this fixture can roll ahead in the underslung part of the trailer, and completely off of the elevator rolls in on a track and is fastened down, and there

would be two fixtures side by side and two in front side by side.

Q. Is the equipment as shown in exhibit 9 the same type of specially made equipment underslung and approximately a foot high as used by Daniel Hamm Drayage Company for Boeing?

A. I know that it is definitely not the same. That particular unit, I believe, runs from St. Louis to Tulsa, and that trailer is ten feet wide, and I believe it has a canvas roof, and it is over thirty-five feet long.

Q. It is approximately eight or nine inches off the ground, is it not, at the bottom?

[fol. 115] A. I believe it is.

Q. In your opinion would the equipment such as shown in exhibit 10 and exhibit 9 fit in the type of trailer Daniel Hamm Drayage Company operates over the road, if you know?

A. It would not be allowed to run over the road because the trailer is ten feet wide, and unless you are carrying a part that is about that wide you are not going to get over-dimension permits.

Q. How wide is this piece of equipment in exhibit 9?

A. Eight feet.

Q. Do you have any leased equipment?

A. No, sir.

Q. This particular truck in exhibit 9 is owned by J-T?

A. Yes, sir, it is; all of our equipment is owned by J-T.

Mr. Brooks: I believe that's all.

Q. (By Mr. Sullivan) Mr. Cooper, do you presently serve Wichita in your automobile hauling operation?

A. J-T Transport Company hauls automobiles from Detroit to Kansas City and Wichita, yes.

Q. And is your Wichita terminal a combination terminal used both by your automobile hauling equipment as well as your aircraft hauling equipment?

A. No, sir, it doesn't.

Q. You don't station any of your automobile hauling equipment at Wichita?

[fol. 116] A. No, sir, it is all stationed at Kansas City.

Q. Have you ever transported any motor vehicles to the Boeing plant at Wichita?

A. No, sir, I don't believe we have. I know J-T Transport Company hasn't. It could be possible that Jack Cooper Transport Company have transported some Chevrolet trucks for the air force, but I don't think they have.

Q. Does this traffic move on commercial bills of lading?

A. Yes, sir, it does.

Q. And does Boeing control the routing?

A. Yes, sir, they do.

Q. And do you have any terminal facilities at Indianapolis, the origin point of the instant traffic?

A. No, sir, we do not.

Q. Now, when the shipper wants service from Indianapolis to Wichita do you deadhead your equipment to Indianapolis?

A. Yes, sir, we do.

Q. Now, have you transported any other commodity except landing gear bulkheads from Indianapolis to Wichita for Boeing?

A. I don't believe we have.

Q. And in your direct testimony when you were mentioning the product or the commodity you always referred to landing gear bulkheads?

A. Yes, sir.

Q. And all of these photos that have been introduced in [fol. 117] evidence show only landing gear bulkheads?

A. Yes, sir.

Q. And do you propose under the operation here to transport any other aircraft assembly other than landing gear bulkheads?

A. We propose to transport any product, airplane assemblies, that Boeing wishes us to transport. Our temporary authority calls specifically for landing gear bulkheads.

Q. Well, are these trailers and shipping fixtures and so forth suitable for the movement of any other aircraft assembly other than landing gear bulkheads?

A. The shipping fixture is definitely not. There is a little room at the extreme front of the trailer, and there is about eight feet in the front and about four feet in the back that smaller components could be carried, but they are not at this time.

Q. Now, if the carrier provided his own winch or crane,

could it be possible to load these items on fixtures through the overhead method of loading?

A. We have found that H. & B., the very limited space they had where the part was loaded, that there just wasn't room to do it.

Q. You are speaking of a crane that would not be located on the piece of equipment?

A. That's right; there just wasn't room to have a portable crane in where the parts were loaded.

Q. Who owns the tracks that are shown in these photographs?

A. The tracks?

[fol. 118] Q. Yes.

A. That is owned by J-T Transport.

Q. And how long did it take you to design and build this special trailer and fixtures?

A. I believe it took about two weeks.

Q. And how much advance notice did you have of this movement to design and build these fixtures and trailer?

A. About two weeks.

Q. And were you furnished blueprints by Boeing to aid you in the installation of these fixtures in the special trailer?

A. It wasn't necessary since our terminal is located at Wichita and our people were able to go in the plant and obtain the necessary measurements that they needed.

Q. Is there any reason why another aircraft part hauler couldn't design and build the same items?

A. We haven't seen any other aircraft hauler design this type of fixture before.

Q. No other aircraft hauler was asked to do it?

A. Well, I don't know.

Q. And you have only transported fourteen loads of these landing gear bulkheads in the past three or four months, is that correct?

A. I believe that's right, sir. It's running about four loads a month.

Q. You mentioned that you have at present an existing [fol. 119] contract covering the proposed service, particularly with reference to the present operation and under temporary authority, is that correct?

A. Yes, sir.

Q. And does that present contract specify a minimum

amount of traffic that will be tendered to you on an annual basis?

A. Yes, sir, it does; it specifies a minimum amount over the period of the contract.

Q. Then the contract assumes that you will be granted permanent authority?

A. I believe the contract says that this contract is valid only if J-T obtains the necessary operating authority.

Q. And am I right in saying that the shipper, the H. & B. Machine Company loads and the Boeing Company unloads the subject traffic?

A. Yes, sir.

Mr. Sullivan: That's all.

By the Examiner:

Q. How much does it cost to construct this special equipment?

A. The trailer, Mr. Examiner, we had the special elevator, which was a new deal for us, and I believe it cost around $1,500. The fixtures, as I remember, cost $465.00 each, and there would be four fixtures to a trailer.

Exam. Cunningham: Any redirect?

Mr. Mc Hendrie: May I ask a question, please?

[fol. 120] Exam. Cunningham: Surely.

By Mr. McHendrie:

Q. Mr. Cooper, when was this special equipment first available for use, approximately?

A. It has been a little over three months.

Q. Now, as I understood you at one point in your testimony, you referred to the period of years that you had been transporting these parts.

A. We have been transporting airplane components over a period of years. These particular parts we have been transporting, I believe it is, just about four months.

Q. None of these particular parts prior to that time then?

A. That's right.

Q. Do you know whether or not any other carrier transported these particular assembly parts to Boeing prior to your first shipment?

A. I believe some were transported by railroad. The traffic manager from Boeing is here, and I am sure he could testify much better on that than I could, sir.

Q. You don't have personal knowledge on that?

A. No, I don't believe I do.

Q. What is the duration of your contract, just for one year?

A. Our contract has a thirty-day written cancellation clause on either party, and it runs until cancelled.

Q. Do you know whether or not this particular unit is for a particular type of plane? I notice the exhibit says [fol. 121] B-52, and that's only for a B-52?

A. It's for a B-52, yes, sir.

Q. And presumably your contract will run only so long as Boeing manufactures this particular type of plane, is that right?

A. That contract would, yes, sir.

Q. And your equipment is adapted to the use in transportation only of this particular part?

A. The equipment that is used for this operation is for this one particular part. We own about fifty trailers and they are all different sizes and configurations, and we feel that we can design a trailer to haul any part that isn't too big to be transported over the highway.

Mr. McHendrie: However, that is not a matter within this particular application today. I think that's all.

Redirect examination.

By Mr. Wrape:

Q. Is the B-52 a classified ship?

A. Yes, sir, it is.

Q. Have your employees been cleared for handling classified commodities?

A. Yes, sir, we have.

Mr. Wrape: That's all.

Exam. Cunningham: Anything further?

Mr. Sullivan: I have two questions on that last item.

Exam. Cunningham: All right.

[fol. 122] Recross-examination.

By Mr. Sullivan:

Q. With what agency of the government have you been cleared for security?

A. Through the air force. I beg your pardon, it's the Defense Department.

Q. The Defense Department?

A. Yes, sir.

Q. And when you say that this is a classified item, you mean it is classified secret or confidential or what?

A. We are classified as to secret.

Q. You are classified as to secret?

A. Yes, sir; that is one notch higher than confidential, and as to just what classification this is I couldn't tell you, sir.

Mr. Sullivan: That's all I have.

Mr. Wrape: That's all.

Exam. Cunningham: That's all, thanks.

(Witness excused.)

Exam. Cunningham: We will take a five minute recess.

(Recess taken.)

Mr. Wrape: Mr. Solomon, please.

Ernest T. Solomon was duly sworn and testified as follows:

Direct examination.

By Mr. Wrape:

Q. Can we have your full name, sir?

[fol. 123] A. Ernest T. Solomon.

Q. And where do you live?

A. At 1714 Windsor Road, Wichita, Kansas.

Q. And with whom are you connected?

A. Boeing Airplane Company, Wichita Division.

Q. And what position do you hold with that company?

A. Traffic manager.

Q. And how long have you been connected with it?

A. I have been with Boeing Airplane Company approximately nine years. I was assistant traffic manager—in 1952 I became assistant traffic manager, and in 1956 I became traffic manager for Boeing.

Q. Now, are your duties generally those of a traffic manager?

A. Yes, sir.

Q. And the problems of routing material at Wichita for Boeing are your problems?

A. Yes, sir.

Q. Is it up to you to arrange for transportation?

A. It is.

Q. Now, are you familiar with the application that is here being presented to the Examiner?

A. Yes, I am.

Q. At whose request was this application filed?

A. At Boeing's request.

Q. Were you present when Mr. Cooper testified?

[fol. 124] A. Yes.

Q. Did you hear him state that at the present time the applicant had temporary authority to transport the commodity that was here involved?

A. Yes, I did.

Q. And at whose request was that temporary authority secured?

A. Boeing's request.

Q. And did Boeing support the applicant in securing that temporary authority?

A. Yes, we did.

Q. And is that your purpose in being here today?

A. It is.

Q. Now, Mr. Solomon, would you tell us what is the commodity that is illustrated in the exhibits that have been identified by the witness?

A. This is landing gear bulkhead for the B-52 jet bomber that is manufactured by our plant at Wichita, Kansas.

Q. Is your company the prime contractor for that plane?

A. Yes, they are.

Q. And your contract is with who?

A. The United States Air Force.

Q. And about how long has the B-52 jet bomber been in production?

A. Approximately two years.

Q. Now, I believe the number of planes under your con- [fol. 125] tract is a classified matter?

A. It is.

Q. Now, could you give us the exact dimensions of the bulkhead that is here involved?

A. The dimension of these assemblies are 122.5 inches by 181 inches by 24.75 inches. That is the aft bulkhead.

The forward bulkhead is 128 inches by 90 inches by 42 inches.

Q. And could you tell us what each of them weigh?

A. The aft bulkhead weighs 1340 pounds, and the forward bulkhead weighs 1380 pounds.

Q. That would give the truckload a gross weight, cargo of about 5500 pounds?

A. Approximately.

Q. Now, could you tell us of what material those bulkheads are made?

A. Those are made primarily of aluminum. There are some other metals involved. I am not sure, but I believe it is titanium and possibly magnesium.

Q. And could you tell us the value of each of these components?

A. The aft bulkhead is valued at $24,690, and the forward bulkhead is $23,955.

Q. Now, would you tell us whether or not these bulkheads are susceptible to damage from contact, strain and stress?

A. They are very susceptible to that type of damage. They are very close tolerance items that have been built [fol. 126] to exacting specifications. They go immediately into the main body section of the aircraft at our plant at Wichita and they have to fit perfectly into that component part, or we have trouble.

Q. Now, are these commodities when received at your plant at Wichita subject to any kind of inspection?

A. They are subject to very rigid inspection by both our Boeing inspectors and Air Force inspectors.

Q. Now, if there is any material damage what do you have to do?

A. A case of that kind, depending on the nature of the damage, if it was very substantial damage or of any nature that required putting the part back into the original jig, it would have to go back to Indianapolis.

Q. You mean the manufacturing jig?

A. The manufacturing jig.

Q. Do you maintain at Wichita a duplicate set of manufacturing jigs?

A. Not for this particular part.

Q. Now, is this particular part manufactured to be put in stock, or is it manufactured for a particular airplane with a particular serial number?

A. These parts are manufactured for a particular aircraft unit that is under way in production at our plant at Wichita.

These parts must come in and be scheduled right into our production line on a very close schedule, and it is of the highest importance that these assemblies reach our [fol. 127] plant at the predetermined time so as not to slow up or stop our production line.

Q. And it is manufactured for a given airplane that has a particular serial number?

A. That is right, sir.

Q. You just can't put this bulkhead on another B-52?

A. No, due to engineering changes and that type of thing each part, or this particular part has to be specified for a particular serial number and aircraft.

Q. Now, if there was a delay at Indianapolis in production or a delay in transportation and the unit arrived in Wichita late, what do you have to do about your assembling?

A. Well, that would be an out-of-sequence installation which in some cases if it could be done would be very expensive to us, cost us many, many times more money to put this part in out of its proper place as it would to put it in the aircraft at the point it is supposed to go into it; and there is a limit on this particular part where the production line could be stopped cold, because it goes into the major body section of the airplane, and they have to have that in there before they can build that.

Q. What is the function of the bulkhead?

A. The main landing gear is attached to this bulkhead, the B-52 bomber.

Q. Now, on the occasion of the manufacture of the trailer [fol. 128] the designing of the trailer and the jigs, did your engineering department approve the shipping fixtures as well as the trailer?

A. Yes, sir, they did.

Q. Are you familiar with the facilities of the manufacturer at Indianapolis?

A. I have not seen the facilities myself. My assistant was up there, however, at the initial loading of these parts, and gave me a fairly accurate description of the situation.

Q. Are you familiar with the fact that the applicant maintains a terminal in Wichita?

A. Yes, I am.

Q. And would you tell us how frequently your office and their office at Wichita are in contact?

A. I would say that we are in daily contact and sometimes many times each day.

Q. And are their personnel, their supervisory personnel at Wichita permitted in your plant?

A. Yes, they are.

Q. Now, have you used any other form of transportation in the movement of any of these units?

A. Yes, prior to the time that we asked J-T Transport to haul them we shipped these by railroad.

Q. And were they shipped uncrated?

A. They were shipped in a returnable crate that was [fol. 129] loaded on flatcars.

Q. Now, do you recall the cost of that crate?

A. Yes, sir, just a minute and I will have that here for you.

The container was valued or cost $1,552 each.

Q. And do you know what the cost would have been to your company if you would have continued to use those crates?

A. We have made some calculations on the savings that we have realized by the use of the J-T special equipment and by switching from the returnable container shipped on railcars to the J-T special equipment. We estimate that we will save about 11,570 man hours in the handling of

these parts at both our plant and at H. & B. This figure is for both plants.

Q. Now, is that a saving in man hours related to the crating and uncrating?

A. Yes, it is.

Q. Now, did you——

A. Pardon me, primarily it is to the crating and uncrating. That answers your question.

Q. Now, did you make any computations with respect to the money that was involved in using the returnable crate as compared to the shipping fixture?

A. Yes, let's see here. The returnable type containers, both for the forward and aft landing gear bulkheads cost $2,984. The total aggregate cost for the entire contract we estimate to be around $53,717, which includes replacement [fol. 130] and the maintenance factor, and then on top of that there is a cost to return these containers back to the manufacturer of the landing gear bulkheads at Indianapolis, and the cost of this freight would be approximately $16,541.

Q. Now, do you have a picture of the component in the crate that was used in the rail shipments?

A. Yes, I do.

Mr. Wrape: May this picture be marked for identification as exhibit 11?

Exam. Cunningham: It will be identified as exhibit 11.

(Photograph was marked applicant's exhibit No. 11, Witness Solomon, for identification.)

Q. You have before you exhibit 11. Tell us what that is.

A. This is a picture of the returnable container that was formerly used in the shipment of the B-52 landing gear bulkhead.

Q. Is this the crate for the aft bulkhead?

A. Yes.

Q. Now, when you effected this manhour savings did that have any effect on your contract with your vendor at Indianapolis?

A. Yes, it did. We were able to secure a reduction in the price of the landing gear bulkhead that was equal to the man hours saved by this use of J-T special equipment.

Q. Now, under your contract with the United States Government are you subject to renegotiation?

A. Yes, we are.

[fol. 131] Q. And will that saving in that fashion be passed on to the government?

A. In a sense.

Mr. McHendrie: I will object to that; that is purely speculative.

Mr. Wrape: I will withdraw the question; I think it is speculative, too. I trust it will, though.

Q. Now, have you had any damage in the use of the applicant's service on this commodity?

A. Not on this commodity.

Q. How long has the applicant been serving you?

A. We have been using the J-T Transport Company since June the 1st 1952.

Q. How many loads of aircraft components have they transported for you in that time?

A. As of May the 17th 1957 they have transported 2,113 loads.

Q. And on how many of those loads did you file claims for damage?

A. There were four damage claims during that time for a total of $169.75.

Q. That was the total amount of the claims?

A. For all four claims.

Q. Now, do you understand that the applicant here is a contract carrier?

A. Yes, I do.

[fol. 132] Q. Did that fact mean anything to you in determining to bring about the filing of this application and your support of the application?

A. Yes, it did, because we recognized that the contract carrier can dedicate equipment to our service, the type of equipment that we want, and we feel that on this type of a transportation it is the best thing to have the equipment solely dedicated to our use.

Q. Now, do you use in the transportation of other commodities common motor carriers?

A. Yes, we do.

Q. Do you use rail lines?

A. Yes, we do.

Q. And do you understand the factors that are involved in their service?

A. Yes.

Q. You have contact with them daily with respect to their operations?

A. Yes.

Q. Does the maintenance of the terminal by J-T at Wichita mean anything to you?

A. It means very much to us inasmuch as the type of operation that they conduct in hauling these various components for us, we find the daily coordination that we are able to have with the J-T employees at Wichita is very [fol. 133] helpful to us, and is, I would say, necessary to the successful operation of this type of service.

Q. Is time in transit of any importance to you?

A. It is of very much importance to us.

Q. Tell us why.

A. Normally in manufacturing airplane parts there are many, many engineering changes that must go into each unit. As these engineering changes are incorporated they have to lock them out so far down the line, and if you have a longer transit time it takes you that much longer to get these changes into the picture. In other words, these changes mean an improvement on the airplane, and if we have a longer transit time it takes us that much longer to get these changes into our aircraft that we are rolling off the production line.

Q. Now, in your use of J-T service on this particular operation, do you tell them when to go get the load?

A. Yes, we do.

Q. Mr. Cooper testified that he had a unit that was stationed at Wichita that he sent to Indianapolis on your command, is that true?

A. That is true.

Q. Do you know whether or not the employees of J-T have been cleared for security?

A. Yes, they have been cleared.

Q. Is that required of this particular operation?

[fol. 134] A. I would say it is, because they could run up against an item that would be of a secret classification, and they do have access to—by designing the fixtures for some

of these parts they might have to have access to some of the drawings that are of a classified nature.

Q. Are they in and about your plant, too?

A. Yes, they are.

Q. Now, how do you regard the J-T Transport Company in your scheme of operations?

A. Well, we feel they are just merely a part of our production line in that we can schedule the parts right from our manufacturer, and the shipments are moved right into our receiving area and through the inspection and right on into our production, so they are actually just an extension of our production line.

Q. And will you tell the Examiner whether or not Boeing believes that it needs the service here proposed in order to successfully complete its contract.

A. We feel we definitely need this type of service to furnish or build the best type of aircraft that we can for the United States Air Force.

Q. You gave us a figure as to estimated man hours savings. Do you have the corresponding money savings?

A. I am sorry, I don't; I didn't have that calculated. It would be several thousands, though, I assure you.

Mr. Wrape: I will offer exhibit 11 and I will tender the witness for cross-examination.

[fol. 135] Exam. Cunningham: Any objection to exhibit 11?

Mr. Brooks: No objection.

Mr. Sullivan: No objection.

Exam. Cunningham: Exhibit 11 will be receivable in evidence.

(Applicant's exhibit No. 11, Witness Solomon, for identification, was received in evidence.)

By the Examiner:

Q. Is your plant in Wichita located in the city limits of Wichita?

A. No, sir, it isn't; it is just outside the city limits about a mile or two.

Q. Is the plant at Indianapolis located within the city limits of Indianapolis?

A. It is my understanding it is.

Q. Is there any other airplane factory at Wichita besides Boeing?

A. Yes, sir, there is the Beech Aircraft Corporation and the Cessna Aircraft Company.

Q. How large is Wichita?

A. It is about 220,000.

Exam. Cunningham: Cross examination.

Cross-examination.

By Mr. Brooks:

Q. Sir, you are not aware of where Beech Aircraft obtains its parts? You wouldn't know whether they come from Indianapolis or some other town, would you?

A. Normally I wouldn't, no, sir.

[fol. 136] Q. Sir, you said that the aft section weighed about 1340 pounds, the forward section weighed 1380 pounds, and when Mr. Wrape asked you for the total cargo weight, 5500 pounds, you indicated yes. Was that correct?

A. That would be on the load of two fixtures. That would be about right, I would say. I would have to calculate it.

Q. What I am getting at, it is incorrect because you haven't taken into account the weight of the carrier for these parts, is that not so?

A. That is not so. That is part of J-T's shipping fixture, and we do not take that into account in billing these parts.

Q. Well, what I am getting at, we are talking about the weight of the shipment, and the shipment including these carriers made out of pipe, would they exceed 5500 pounds, would they not?

A. I am sure it would.

Q. Yes, sir. And then in addition there would be the other accessory equipment of the tracks and various other items on the trucks, is that right?

A. The only thing I know of would be the spare and the tracks and this elevator equipment that is used.

Q. Now, sir, you had nothing to do with the engineering of this particular piece of equipment belonging to J-T, did you?

A. We approved the design.

Q. When you say "we" you are referring to someone else other than yourself in Boeing Aircraft Company?

[fol. 137] A. I approved the design as well as our engineering group and our two design groups. Three agencies in our plant have to sign off on these drawings.

Q. With reference to exhibit 7, the roof of that truck is detachable from the truck itself, is it not?

A. Yes, it is.

Q. The equipment, that is, the commodity sought to be transported here, could just as easily be loaded on a rail with a snatchblock or gantry just as easily as having an elevator, could it not, sir, if you know?

A. Well, I would have to see the design of just what you have in mind to say whether it could be loaded just as easily or not.

Q. Well, sir, if you had on exhibit 7 a rack which would roll down the sides or a monorail down the center and a snatchblock or gantry which would lower these units holding the bulkheads into the lower portion of the floor, that would be satisfactory, just as good as the elevator, wouldn't it?

A. I wouldn't say it would be as good. I would prefer the elevator for that type of thing. You don't have near the control over letting the parts down into the well of the truck, I would say, with the overhead facility there. You would be lowering them by a pulley method on a block and tackle, or something of that nature, down into the well. I would prefer this arrangement, personally.

Q. Well, sir, now the H. & B. Company does the loading [fol. 138] at their plant in Indianapolis. You do not perform that operation, do you?

A. That is right.

Q. So then it would depend on what would be satisfactory with them, and assuming that the articles arrive safely without breakage then that would be the real test, would it not, sir?

A. I would say this, that H. & B. American are very well satisfied with this.

Mr. Brooks: Just a minute. I will object to anything that H. & B. may be satisfied with, Mr. Examiner.

Exam. Cunningham: Strike the last part of the answer.

Q. Who was the last traffic manager for Boeing Aircraft?

A. Fay L. Eldridge.

Q. Is he still with your firm?

A. Yes, he is.

Q. Pardon me, sir. Is that Boeing Aircraft or Boeing Airplane Company?

A. It is Boeing Airplane Company.

Q. I see, thank you. Now, are you acquainted with the Belger Cartage Service, Inc., with offices, terminal facilities, equipment in Kansas City, Missouri, and also Wichita, Kansas?

A. I am.

Q. I see. At the time you considered J-T Transport and requested them to make an application for temporary authority, did you give the Belger Cartage Service, Inc. [fol. 139] an opportunity to provide this service?

A. No, I didn't.

Q. You did not. You were aware, sir, and prior to that time your former boss and traffic manager, Mr. Eldridge, was aware that the Belger Cartage Service offered transportation to interchange between Indianapolis, Indiana and Wichita, Kansas, did you not, sir?

A. I was aware that they had offered their services; however, it was my understanding that they did not offer them directly to Mr. Eldridge, but to some other people in the Boeing plant.

Q. I see. Well now, if the Belger Cartage Service through interchange with Daniel Hamm Drayage Company could render a service using one track or trailer unit suitable in design to transport this commodity from origin to destination using the same driver, the same equipment, and with an overriding insurance cargo coverage to your firm, would there be anything wrong with that service, in your opinion?

A. Yes, there would. It would be a two-line haul even though the equipment might come all the way through. It would still be under the control of two different carriers, and to my knowledge I know of no experience that Belger Cartage has or their possible connections in the transporting of aircraft components, and especially fixtures and the experience of designing this type of equipment that is required.

Q. You do know, sir, of the special equipment of a very [fol. 140] similar nature to the instant equipment shown in the exhibits of the applicant, that the Daniel Hamm

Drayage Company also transports components and uses drop-frame trailers on the sides, which the base of the equipment is only some nine to twelve inches off the road, do you not, sir?

A. Yes, I know about one movement from, I believe it was St. Louis to Tulsa that they moved, used that type of equipment; however, I think that there again we would have a two-line haul from Indianapolis to Wichita, and as I said, I don't think that we can have the direct control over two carriers that is required to move these parts in the manner in which we want them moved.

Q. Yes, sir, but I assume, sir, that your company had some sort of emergency and that is why you made the original request of J-T to apply for an emergency authority, is that not correct, sir?

A. We had an emergency to this extent, that we wanted to get away from this bundlesome handling of the shipments in the returnable-type container at the earliest possible time.

Q. Yet you knew that by an interchange movement whereby one truck and trailer could be used, tractor-trailer could be used, that that service could be rendered through the Belger Cartage Service, Inc. with terminal office facilities and equipment right in Wichita where your firm has its main office, is that not so?

[fol. 141] A. I didn't know that it could be done. I knew that they have an office there, but I have had no experience with them transporting this type of part; and as I said, I have had no knowledge of experience that they have had in designing a fixture of this type.

Q. But, knowing that the transportation could be accomplished you still did not give them that opportunity to render the service and request a temporary authority through the J-T?

Mr. Wrape: I will object to the form of the question. I think it is argumentative.

Exam. Cunningham: The objection is sustained.

Q. Now, when you were figuring out this saving did you deduct the cost to Boeing Airplane Company of the four fixtures to hold the commodity being transported?

A. This savings that I mentioned, the man hours savings, is that what you are interested in?

Q. Yes, sir.

A. That is only the man hours savings. There was no material calculation, cost of fixtures involved in that.

Q. I see. You didn't even include the four racks that Boeing Airplane Company had to build because of this truck movement, is that right?

A. No, it is strictly a man hour savings.

Q. Now, you said that there was cost involved in returning the crates as set forth in exhibit 11. By the same token [fol. 142] the J-T equipment can only be used on this one movement, therefore the equipment must be returned from Wichita to Indianapolis in order to bring back another load, and in the return movement they have to also carry these racks back with them, do they not?

A. They carry the racks back empty.

Q. So, therefore, there is an expense involved to Boeing Aircraft or Airplane Company for that return movement, is there not?

A. I would say there probably is. It's in the over-all cost of the contract. It isn't set out as such.

Q. Yes, so when you indicated that the return empty cost by rail was $16,341, according to your estimate, in effect you are probably paying more to J-T to return the entire truck and the racks than it would to return the crates by rail, would it not?

A. I am sure that it would not.

Q. You don't think so.

A. No.

Q. But you haven't figured it out, I take it?

A. I haven't figured it out personally; I think my staff has.

Q. Now, sir, there was testimony here this morning that the vehicle used to transport these assemblies was a one-purpose vehicle and could not be used for any other purpose than transporting the commodity involved, and that is set [fol. 143] forth in exhibits 7, 8, 9, and 10, is that not so, sir?

A. That's right.

Q. Now, if a common carrier were to offer you trailer equipment of similar nature and operation as applicant has offered, why would you not be able to use the services of a

common carrier just as you would the services of a contract carrier?

A. Because the common carrier cannot dedicate his equipment exclusively to our service as a contract carrier can.

Q. Well now, sir, if equipment can only be used for one purpose and that is to haul this particular item, and were to be set off especially for your purpose, would that not be satisfactory, whether it was a common carrier or a contract carrier?

A. Well, I would like to clarify one point. I would say that the trailer could possibly be used to transport another commodity. The shipping fixtures inside of the trailer could not. I don't know that the trailer couldn't be used to transport another commodity, though, with the shipping fixtures removed.

Q. Well, sir, is that the main reason why you have requested the applicant to make this request for permanent authority, because he is a contract carrier as against a common carrier?

A. Not necessarily because he is a contract carrier against a common carrier, but because of the type of service that they perform over-all. The various aspects of it all being weighed, they seem to be able to perform the best type of service for what we want.

[fol. 144] Q. Are you acquainted, sir, with the fact that the Belger Cartage Service has some eight or nine drivers cleared, security clearances, as well as drivers for the Daniel Hamm Drayage Company, do you know that?

A. No, I don't.

Q. If that were the case then that would clear up the security point, would it not?

A. I would assume that that would take care of it, if they were the people that were involved required to have knowledge of this.

Q. Now, with reference to daily coordination and having an office terminal and facilities at Wichita, that would be no more true with the applicant than it would with the Belger Cartage Service, would it not, sir?

Exam. Cunningham: I think we are getting—aren't we getting into a lot of repetition here?

Mr. Wrape: I think we are.

Exam. Cunningham: We had that before and he said it

would be a two-line haul, and it didn't make any difference whether they had any facilities in Wichita or not if it was a two-line haul. I have heard that three times.

Mr. Brooks: I am trying to find out, sir, what would be wrong with the interchange movement if it was operated on one truck and one driver from origin to destination, and subject to coordination at the Wichita office of the Belger Cartage Service.

[fol. 145] Exam. Cunningham: You have already had that. He said he didn't want to use two lines, isn't that correct, sir?

The Witness: Yes, sir, that is right, Mr. Cunningham.

By Mr. Brooks:

Q. Have you had any bad experience in using either of these two carriers in that type of service?

A. No, sir.

Q. Is this item being transported set out on exhibits 8, 9, and 10, is that a classified item?

A. The part as to its shape and all is not a classified item. The exact performance of that part, performance characteristics on the B-52, it is all classified information.

Q. Now, one other thing, sir, and I am through. On any item shipped by or for and on behalf of the Air Force, all varying subject to weather damage, they are covered with a waterproof covering with some sort of cosmoline or protection, is that not so, sir?

A. I am not sure that that is the case; I can't answer that question.

Q. Well, in this exhibit, sir, exhibit 10, are the bearing parts there properly covered to protect them against the elements?

A. They are covered, but I would not be in a position to say that they are——

Exam. Cunningham: That is repetitious, too. We had that from the operating witness who received the shipments.

Mr. Brooks: I believe that's all.

[fol. 146] By Mr. Sullivan:

Q. Mr. Solomon, have you been authorized by your company to appear in support of this application?

A. I have.

Q. And who in the company authorized it?

A. Mr. Fay L. Eldridge.

Q. Who is the general traffic manager of the Boeing Airplane Company?

A. We have no general traffic manager.

Q. Who is in charge of your over-all traffic department then?

A. At Wichita?

Q. No, of the entire company.

A. We have no one over both the Wichita and the Seattle department, traffic department. They operate as independent groups.

Q. Would you say that your Seattle plant is your main plant?

A. The Seattle plant is where our general office is located. It is considered our main plant.

Q. And you do not have any officer in your general offices that is in charge of your entire traffic set-up?

A. I would say that we have headquarters' people in our headquarters division that are over both plants, for that matter, all jobs in both plants.

Q. Now, are you supporting this application for any aircraft assembly other than landing gear bulkheads?

A. I would prefer to see it granted for other parts due to [fol. 147] the fact that at various times we find it necessary to place additional work with some of our sub-contracts, such as H. & B. American, where they may be furnishing other parts to us. We find that oftentimes we start out maybe manufacturing with one part and then we will place other work in there if they do us a satisfactory job, and they do have the facilities to do the work; or quite often the nature of the part that they are manufacturing is completely, the requirement for it is eliminated, and in its place something else of a different nature might be placed in.

Q. But, do you know at the present time as a fact whether any other aircraft assembly will move from Indianapolis to Wichita except landing gear bulkheads?

A. As far as I know right now that is the only thing that will be moving from H. & B.

Q. And this will move during the rest of this prime con-

tract that is now in existence between Boeing and H. & B.?

A. Right.

Q. And can you tell us the termination date of that contract?

A. I believe our present contracts extend into 1959.

Q. '59?

A. 1959.

Q. Can you tell us anything about the expectant volume of traffic on a monthly or a yearly basis that will move under this contract?

[fol. 148] A. I would say that approximately four loads a month will move. It could vary to a great extent depending on how the Air Force schedules our production; but, it is my estimation that it will run around four loads a month right now.

Q. Does your company sub-contract this particular item to any other concerns?

A. The Wichita division does not sub-contract this item to any other concerns that I know of.

Q. Do you know whether H. & B. have contracts with any other aircraft manufacturer for this particular item?

A. I don't know that they do, but I am almost certain that they don't because the only other one that manufactures the B-52 bomber would be our Seattle division, and to my knowledge they are not manufacturing that part for Seattle.

Q. Now, taking into consideration your long experience in the field of traffic, is it not true as a general practice that the shipper provides the fixture or the container for the traffic that moves rather than the carrier?

A. That is the normal way common carrier traffic is handled, yes, I would say.

Q. How much advance notice did you have or your company have that this traffic was going to move from Indianapolis to Wichita?

A. Well, we had been transporting these parts for several months by railroad prior to the time that we changed over.

[fol. 149] Q. And when you changed over from rail to motor carrier did you make any investigation to determine whether there are any presently-authorized motor carriers able to perform service?

A. Yes, I made an investigation.

Q. And what did that investigation reveal?

A. I found that U.S.A.C. Transport, a common carrier, had authority to transport these commodities, but they did not have a Wichita office; and further our past experience with this company has not been the best. We had several unsatisfactory experiences with them both on some movements that they actually hauled and another case of where we tried to get them to set up a contract for us. The last experience on that was unsatisfactory.

Q. What year did this experience occur?

A. 1953.

Q. In 1953, and how many times did you use them in 1953?

A. I am not sure, but I would say two or three different loads were hauled in by them at that time.

Q. And what was the actual unsatisfactory experience with these particular loads?

A. The one load that I recall at this time came into our plant with the airplane part unbolted from the shipping fixture lying one of it or one edge of it lying down on the floor of the truck loose, and it was very apparent to us that in the first place the shipping fixture was not of an adequate [fol. 150] design to transport the part properly; and in another case, or another thing about it, it looked like the load was not inspected en route at all, or someone hadn't noted that it came unbolted and had fallen down on the floor.

Q. Now, was the liability for this damage the fault of the carrier or the shipper?

A. I cannot say as to that, because the part in question was shipped from the Oliver Corporation at Battle Creek, Michigan, and it was their responsibility to negotiate the settlement with the carrier.

Q. And was a claim for damages submitted?

A. I do not know that.

Q. You didn't pay the freight charges on that particular shipment?

A. I can't say; I can't answer that.

Q. How many unsatisfactory experiences in 1953 did you have?

Exam. Cunningham: It's no use going back that far; it is too remote anyway.

Q. Now, you have stated that your present contract with regard to the B-52 has been in effect for approximately two

years and rail has moved the landing gear bulkheads for approximately seven months. Did any other carrier move them during the period of the contract?

A. I would like to correct one thing. I said several months; I didn't give a specific time element. But, to my [fol. 151] knowledge the only shipments that we have moved in from H. & B. American Machine have been by railroad to the time that we moved them, started moving them by J-T Transport.

Q. And as long as this movement has been in existence you have had no damage experience one way or the other?

A. No, we haven't.

Q. With regard to delay in time of transit, would your company not receive more expedited service if the carrier performing the service had equipment stationed at Indianapolis rather than at Wichita, which involves the deadheading of equipment from Wichita to Indianapolis?

A. I don't believe that we would, because we know far enough ahead of time the exact schedule that these parties will move on, and we are able to schedule the movement in such a manner that the carrier has ample time; that is, J-T Transport has ample time to move their equipment to the shipper's dock in Indianapolis.

Q. Do you believe that the proposed operation could be handled by the overhead loading method of operation?

Exam. Cunningham: That's repetitious.

Mr. Sullivan: I didn't hear him answer the question before, but I will eliminate it. I am going to introduce this as an exhibit later on.

Q. I show you a picture of a U.S.C.A. trailer that is located—it's in our advertising brochure. Would it not be possible for that type of an underslung trailer to be used [fol. 152] to handle this traffic?

A. I would say no, because it apparently just has a tarpaulin over the top of that, and we found that very unsatisfactory for transporting these expensive components.

Q. Well, if a removable fixed top was installed in the top of that trailer, would that be suitable for your needs?

A. It appears it would be; I don't know what dimensions

that trailer is, but if the dimensions were proper and all it appears it could be possibly used.

Q. Now, on direct examination you referred several times to common carriers. By that do you mean what is known as a general freight carrier?

A. That is primarily what I had in mind, although I realize that it extends to specialized types of common carriers.

Q. Don't you realize that a specialized type of common carrier also dedicates equipment, if a request is made?

A. It is my understanding that a common carrier cannot dedicate equipment to a particular shipper, that he holds himself out to furnish that equipment to any shipper that wants it. That is my understanding.

Q. But if a common carrier had ample equipment with plenty of idle equipment, would it not be conceivable for that carrier to station a trailer at either Indianapolis or Wichita in order to provide the service desired?

A. It appears they could, yes.

[fol. 153] Q. Do you know the distance from Indianapolis to Wichita?

A. I think it is a little over 700 miles.

Q. And do you know if your company has been solicited for the involved traffic by U.S.A.C. Transport?

A. We have been solicited for the traffic.

Q. Do you know how many times?

A. No, I don't know exactly how many times.

Q. Did your engineering company or department help J-T in designing this trailer and installing the fixtures?

Mr. Wrape: That is objected to as being repetitious.

Exam. Cunningham: Objection sustained.

Q. Would your engineering company or department have any objection to assisting another motor carrier of aircraft parts to design a special trailer and install fixtures?

A. I would say they would have no objection to offering the same type of assistance to any carrier that we were considering for a movement.

Q. Does this traffic move on commercial bills of lading?

A. Yes.

Q. Is it later converted to government bills?

A. No, it isn't.

Q. Have you had any experience with any other motor carrier on transit time from Indianapolis to Wichita?

A. We have experience on regular common carriers that serve both Indianapolis and Wichita.

[fol. 154] Q. By "regular common carriers" you mean general freight carriers?

A. Yes, general commodities.

Q. Now, if this application was denied would your company try other aircraft part haulers?

A. I would have to make a determination on what else was available. We would no doubt have to move the traffic, but I am not sure how we would move it if this application is denied. I would have to figure out the next best way to move it considering all aspects of the thing.

Q. Is it not true that your support of this application is based on a preference for applicant based on a long period of close association with this carrier?

A. I would say that enters into it, but it is not necessarily the prime reason. We feel that they can give us this service, is the main reason that we are using it.

Q. Do you feel it is more economical to ship by a contract carrier than a common carrier?

A. In some cases it is; I would say that it isn't always the case.

Q. Is cost a controlling factor in your company's support of this application?

A. It's not controlling; let's say it is not the controlling factor.

Exam. Cunningham: Anything further?

[fol. 155] Mr. Sullivan: Yes, I have a few more questions.

Exam. Cunningham: Let's speed this up; we are wasting a lot of time here.

By Mr. Sullivan:

Q. Are you aware, Mr. Solomon, that U.S.A.C. transports substantial amounts of aircraft parts traffic for the United States Government?

A. I have been told that by your representative; I do not know it to be an absolute fact. I do not know the exact movements involved.

Q. And is your main reason for not using U.S.A.C. based on the instances you mentioned in 1953?

A. No, that is not the controlling thing. I would say the fact that they do not have the terminal at Wichita with people there that we can do business with on a day to day basis is a major factor to consider, and the other is the fact that their tariff says, for one thing, that they can exercise the control of the type of equipment that will be used on any particular movement in the U.S.A.

Q. Is that the recent tariff that went into effect on March 1st 1957?

A. Yes, I can give you the tariff reference on that. That is MFIC No. 30.

Q. Would the fact that U.S.A.C. has a terminal at Indianapolis overcome your objections to the absence of a Wichita terminal?

A. No, it would not, because the main coordination that [fol. 156] has to be done on developing a program of this nature has to be done at Wichita with our people. It cannot be performed with the shipper.

Exam. Cunningham: How much is one of these bulkheads worth?

The Witness: Approximately $24,000; $24,690 on the aft bulkhead.

Exam. Cunningham: Go ahead.

Q. Is it not true that this traffic moves on the Boeing bills of lading?

Mr. Wrape: I will object to that; it's the third time that he has been asked.

Mr. Sullivan: I withdraw that question. That's all I have.

Exam. Cunningham: Do you have any questions?

Mr. McHendrie: Just a few.

Exam. Cunningham: Off the record.

(Discussion off the record.)

Exam. Cunningham: Back on the record.

By Mr. McHendrie:

Q. Mr. Solomon, you stated that this B-52 has been in production for two years?

A. Approximately.

Q. During all of that period has this particular component been moving from Indianapolis to your plant at Wichita?

A. No, it hasn't.

Q. When did the first movement start?

A. The record I have prepared here shows the first ship-
[fol. 157] ment was made on November the 29th 1956.

Q. That was a rail movement?

A. This was a rail movement.

Q. And you continued with the rail movements up until you began using the present applicant, is that correct?

A. That is right.

Q. And these shipments were shipped in this crate, this type of crate as shown in exhibit 11?

A. Yes, sir, that's it.

Q. Did your company own those crates?

A. Yes.

Q. You testified as to the investment in that of approximately $1,550 apiece?

A. Yes, sir.

Q. And that investment was made and your company had the crates on hand at the time the truck movement started, is that right?

A. There was a certain amount of those on hand. We would have had to build a lot more to handle the program as it builds up.

Q. And as far as these fixtures are concerned in which the movement is not made, those are built and owned by the applicant, is that correct?

A. That is right; that is, there is a portion of them that are owned by the applicant. There is a portion of them——

Exam. Cunningham: That is repetitious; we have had it three times that the applicant owns four and Boeing owns
[fol. 158] four, is that right?

The Witness: That's right, sir.

Q. You have no reason to believe that the cost of those fixtures is not included in the contract price charged to you, however?

Exam. Cunningham: How would he know that?

Mr. McHendrie: Well, sir, the applicant's witness this morning testified that he is——

Exam. Cunningham: We don't have anything in the record as to what the applicant even charges him, so how

would he know whether that was included or not? It is obvious that it is; he is not doing it for nothing.

Mr. McHendrie: Very well, sir.

By Mr. McHendrie:

Q. Is your principal objection to the use of these crates then the time spent in crating and uncrating?

A. That and the cost of maintaining them. We have had a tremendous damage factor on the outside covering of those crates that have had to be replaced on the shipments that we made by rail, and it was quite a costly factor.

Q. Damage to the crates?

A. Damage to the outside of the sheet metal covering.

Q. Mr. Solomon, do you know whether or not your company had any discussions with representatives of the railroads as to whether any more satisfactory container of a more permanent type could be devised and used in rail transportation?

A. I have had some conversation with some of the rail- [fol. 159] roads regarding possible use of special shipping fixtures on the rails, but we found that the railroads could not provide the service that J-T Transport could provide.

Q. They could provide or would provide such special equipment, would they?

A. They would not provide the equipment. In most all cases when railroads use specialized transportation equipment they do not provide the fixtures. The applicant usually has to make the fixtures, or the shipper.

Q. In this particular case was there not a possibility that special fixtures could be made and provided for this particular commodity?

Exam. Cunningham: By the railroad?

Q. By the railroad.

A. Yes, they could have been made by the railroad.

Q. So that this particular objection you have as to the use of these crates could have been eliminated?

A. That particular objection could possibly have been eliminated by the use of rail, but it still wouldn't provide the service.

Exam. Cunningham: You would still have to pay for the container, wouldn't you?

The Witness: Yes, we would.
Exam. Cunningham: Go ahead.

Q. But, the elimination of man hours in crating, the man hours in crating and uncrating which you said was your [fol. 160] primary objection, those could have been eliminated or reduced?

A. It could have been—you are speaking of rail special equipment?

Q. Yes.

A. It could have been.

Q. And you have stated that cost as far as return freight is not the controlling factor in your decision?

A. It is not the controlling factor.

Q. Mr. Solomon, you have testified, I believe, that you considered the applicant with this particular type of equipment as really a part of your production line, is that correct?

A. That's right.

Q. You had no objection to rail transportation as far as regularity or reliability of schedule is concerned, do you?

A. Not as to the reliability necessarily, although we find that we cannot control the movements nearly so well as we can by a contract motor carrier. We do not have the exacting control over rail shipments, and we have a great number of special equipment shipments moving in rail service at this time that is too large to move by truck.

Q. You heard the applicant's testimony that there is this one vehicle number 338 on exhibit 4 which is arranged as illustrated by the exhibits and devoted to this particular movement, is that correct?

A. That's right.

[fol. 161] Q. You know, do you not, that any motor vehicle these days is subject to highway accidents, breakdown, becoming inoperable with no notice at all, do you not?

A. Let's say that the past experience with J-T Transport, we have had very little of that.

Q. Nevertheless, it is possible?

A. It is possible.

Q. The production line on these B-52 bombers depends on the continuing operability of one motor vehicle?

A. That's right.

Q. And if that should be in a wreck and should be out, then I suppose you would call the rails in a hurry, would you not?

A. I imagine that the J-T Transport Company would get another piece of equipment in service pretty fast in case anything like that happened.

Q. Then this particular type of vehicle and equipment is not necessarily the only kind that would be available for this transportation, is that right?

A. I would say that it is the only kind that can transport it as it is being transported now. They would have to build another set of shipping fixtures, and, of course, we would have an extra set of shipping fixtures here available. All they would need would be another truck and trailer.

Q. And the rail cars are available at any time, are they not?

A. I would say that generally speaking we have a fairly [fol. 162] good supply of rail cars, although that has been a problem in the last few months, the rail car supply.

Mr. McHendrie: I think that's all.

Exam. Cunningham: Any redirect?

Redirect examination.

By Mr. Wrape:

Q. Mr. Eldridge has been mentioned. What is his position now?

A. Mr. Eldridge is now an assistant warehouse manager for Boeing Airplane Company, Wichita Division.

Q. Have you had an opportunity to compare the time in transit on your rail shipments as compared to your J-T service?

A. Yes, rail shipments ran from three to seven days in transit, and on the J-T Transport shipments all of them, with the exception of one, were in Wichita the next day after they left Indianapolis.

Q. Now, does Belger serve you at Wichita?

A. Let's say they come into Wichita and have a terminal there. I do not know of very few things that we have actually used them for. They have been used more as a rigger or erector and that type of thing.

Q. And not in moving airplane components?

A. To my knowledge we haven't used them at all.

Q. Is it Boeing or is it the company in Indianapolis that controls this traffic and pays the charges?

A. Boeing Airplane Company, Wichita Division, controls [fol. 163] the routing and pays the transportation charges.

Q. And if the permit is granted will Boeing enter into a contract in accordance with the Commission regulations?

A. We will.

Mr. Wrape: That's all.

Exam. Cunningham: Any recross? (No response.) That's all, thanks.

(Witness excused.)

Exam. Cunningham: We will adjourn for lunch until 1:30.

NOON RECESS AND AFTER

(Whereupon at 12:30 p.m., a recess was taken until 1:30 p.m. of the same day.)

[fol. 164] AFTERNOON SESSION 1:30 P.M.

Exam. Cunningham: Are you ready to proceed?

Mr. Solomon: Yes, sir.

Exam. Cunningham: Call your witness.

MARTIN A. DECKER, was duly sworn and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Will you state your name and address?

A. Martin A. Decker, 7434 West Otter Drive, Detroit 35, Michigan.

Q. And with what company are you associated?

A. U.S.A.C. Transport, Inc.

Q. And in what capacity?

A. In charge of fleet control and general overall operations.

Q. And how long have you worked for U.S.A.C. Transport?

A. Since 1941.

Q. And what have been the positions you have held in this organization?

A. All the way from terminal manager, traffic manager, general supervision of all operations, some in tariffs.

Mr. Sullivan: May I have this certificate of U.S.A.C. marked for identification, Mr. Examiner?

Exam. Cunningham: It will be marked as exhibit 12.

(Document was marked protestant's exhibit 12, Witness Decker, for identification.)

Mr. Sullivan: May I have this terminal list of U.S.A.C. [fol. 165] Transport marked as an exhibit.

Exam. Cunningham: It will be marked as exhibit 13.

(Document was marked protestant's exhibit 13, Witness Decker, for identification.)

Mr. Sullivan: May I have this list marked "Equipment Distribution by Terminal" marked for identification?

Exam. Cunningham: It will be identified as exhibit 14.

(Document was marked protestant's exhibit 14, Witness Decker, for identification.)

Mr. Sullivan: May I have this list marked "Equipment Available" marked for identification?

Exam. Cunningham: It will be identified as exhibit 15.

(Document was marked protestant's exhibit 15, Witness Decker, for identification.)

Mr. Sullivan: May I have the advertising brochure of U.S.A.C. Transport marked for identification?

Exam. Cunningham: It will be identified as exhibit 16.

(Document was marked protestant's exhibit 16, Witness Decker, for identification.)

By Mr. Sullivan:

Q. Mr. Decker, looking at U.S.A.C.'s certificate of public convenience and necessity, will you point out therein the authority under which U.S.A.C. would perform the service?

A. It would be under MC 108068, Sub 12, dated January the 18th 1950.

[fol. 166] Q. What does that state, roughly?

A. It's points and places east of the Mississippi and points west of the Mississippi on aircraft component parts, crated and uncrated.

Q. Turning to U.S.A.C.'s terminal list, will you point out therein, the terminals from which U.S.A.C. would perform the proposed service?

A. In the first column it would be the next to the bottom, Indianapolis would cover the shipping point. Anything from Wichita would either be covered from Dallas or Topeka, Kansas.

Q. Now, on the equipment available May 15, 1957, will you point out therein which equipment would be used by U.S.A.C. to perform the proposed service?

A. Let me see what list you are looking at.

Q. Equipment available, May 15, 1957.

A. Excuse me. In the list of five semi-trailers, open-top vans, it's the sixth article down. There are two trailers which are identical with the one shown in the brochure in the middle page. I merely referred to this one right here (indicating).

Q. Are you pointing to the advertising brochure of U.S.A.C. Transport?

A. Right.

Q. And that's the second photograph?

A. Right, it's identified in the brochure.

Q. Taking into consideration Mr. Solomon's testimony [fol. 167] here today how would U.S.A.C. perform the service requiring this type of trailer?

A. It would be modified to carry the necessary fixtures and also to install what he termed as being necessary a roof that would be removable or go up and down with his fixture.

Q. And how would U.S.A.C. perform the loading and unloading?

A. Well, that would depend entirely on what facilities are available at the loading point.

Q. Would U.S.A.C. perform the type of loading service that is now provided by J-T and the H. & B. Company by use of the fork lift truck?

A. Yes, we could.

Q. Now, how would you do that?

A. By building fixtures adaptable to the equipment to be transported and loading in the same procedure that they are loading right now.

Q. Has U.S.A.C. transported similar types of aircraft parts in the past in this type of equipment?

A. Similar in size or in the specific commodity?

Q. Delicate and fragile aircraft parts?

A. Definitely we have.

Q. And has U.S.A.C. had experience in installing fixtures?

A. We have.

Mr. Sullivan: May we have this identified?

Exam. Cunningham: It will be marked as exhibit 17.

[fol. 168] (Photograph was marked protestant's exhibit 17, Witness Decker, for identification.)

Q. Will you look at this photograph identified as exhibit 17, and will you describe that?

A. The roof on that is removable in two sections, and both ends are removable for loading and unloading purposes.

Q. Is that overhead loading?

A. Yes.

Mr. Sullivan: May I have this photograph marked for identification?

Exam. Cunningham: It will be identified as exhibit 18.

(Photograph was marked protestant's exhibit 18, Witness Decker, for identification.)

By Mr. Sullivan:

Q. Will you look at exhibit No. 18, Mr. Decker, and tell us what that is?

A. That is the same unit when the ends and the roof are removed and the component parts are loaded in place ready for transit.

Q. And what is the commodity being transported?

A. Those are parts to the B-36 that were transported from Nashville, Tennessee, to Fort Worth, Texas.

Q. And what specific part?

A. Flaps.

Mr. Sullivan: May I have this list marked regular run shipments from La Porte, Indiana, to Tulsa, Oklahoma, marked for identification?

[fol. 169] Exam. Cunningham: It will be identified as exhibit 19.

(Document was marked protestant's exhibit 19, Witness Decker, for identification.)

Q. Will you look at exhibit No. 19, Mr. Decker, and tell us what that depicts?

A. That represents movements that were made on ailerons for the B-47. There is only enough of them listed here to show that the movement was accomplished. There was many more than this and it was for the Whirlpool Corporation at La Porte, Indiana, to the Douglas Aircraft at Tulsa, Oklahoma.

Q. What type of equipment was used and what was the specific part?

A. It was removable-roof vans and the fixtures were built in such a way that the roof could be removed. They could either be loaded through the roof or they could be loaded through the back end.

Q. And did your company install the fixtures on these vans?

A. We had them installed.

Mr. Sullivan: May I have this list marked "Regular Run Shipments from La Porte, Indiana, to Marietta, Georgia" marked for identification?

Exam. Cunningham: It will be identified as exhibit 20.

(Document was marked protestant's exhibit 20, Witness Decker, for identification.)

Q. Will you tell us, Mr. Decker, what exhibit No. 20 depicts?

[fol. 170] A. That is a list of movements that were from La Porte, Indiana, to the Lockheed Aircraft at Marietta, Georgia. They were flaps for the B-47 also.

Q. And what type of equipment?

A. The same type of equipment that was used on the Tulsa. They had removable roofs and could be loaded either through the roof or through the back end.

Mr. Sullivan: May I have this list marked "Regular Run Shipments from Evansville, Indiana, to Farmingdale, New York," marked for identification?

Exam. Cunningham: It will be identified as exhibit 21.

(Document was marked protestant's exhibit 21, Witness Decker, for identification.)

By Mr. Sullivan:

Q. Will you tell us, Mr. Decker, what exhibit No. 21 shows?

A. That is a list of movements from Evansville, Indiana to the Republic Aviation at Farmingdale, Long Island. It was wing panels and component parts with special fixtures built into the trailer which were not removable.

Mr. Wrape: What airplane was that?

The Witness: Pardon?

Mr. Wrape: What airplane?

The Witness: Republic.

Q. The airplane?

A. F-84.

[fol. 171] Q. Will you describe your terminal facilities at Indianapolis?

A. We have a two-room office down there; possibly the rooms are fifteen by twenty. They have parking facilities in the lot for approximately fifteen units. There is a terminal manager and one office girl.

Q. And how much equipment do you have regularly stationed at Indianapolis?

A. Seventeen pieces of equipment.

Q. And what shippers do you serve in the Indianapolis area?

A. Ford Motor.

Q. With respect to aircraft parts?

A. Allison; this is all aircraft parts, Ford, Allison, General Electric, the Air Force at Dayton.

Q. And in addition to this equipment that is stationed at Indianapolis, how many units of equipment do you have floating in the general area of Indianapolis?

A. Can I check just a minute here?

Q. I think that is shown on one of the exhibits.

A. In the month of March of this year there was 153 units dispatched from the Indianapolis terminal. In the month of April there was 145.

Q. But, on any given average day how much equipment do you have operating in the Indianapolis area in addition to the ones that you mentioned were stationed at Indianapolis?

A. There are approximately six to eight units a day that [fol. 172] move through the Indianapolis terminal.

Q. Now, do you know the number of loads that you move daily in and out of Indianapolis?

A. T-7 represents Indianapolis; if you turn to the terminal list it will confirm it. I can break it down on a daily basis or I can give it to you on a monthly basis.

Q. Let's try it on the daily basis first.

A. Starting with March the 1st, on the 1st there were two loads out of there and six deadheads. On March the fourth there was one load and no deadheads.

Q. All right; let's switch to the monthly basis.

A. In the month of March there were sixty-one loads dispatched; ninety-two units moved away from there deadhead because there wasn't any freight for them.

Q. How about in April, '57?

A. April is over there (indicating). In the month of April there was sixty loads and eighty-five deadheads.

Q. By "sixty loads" you mean sixty units moved in?

A. Sixty units were dispatched away from there loaded; eighty-five dispatched away deadheaded. So far up until and including the 18th of May there has been thirty-two loaded and forty-two dispatched empty.

Q. Is deadheaded mileage a problem of your company, sir?

A. Right at present I would say approximately sixty-percent is deadheaded, is loaded compared to the deadheaded.

[fol. 173] Q. You also have an empty equipment problem in the Wichita area?

A. Yes, we do.

Q. And in connection with what service?

A. Pardon?

Q. In connection with what service, with what operation?

A. Well, it's an overall operation because there are more

units dispatched in there than there are loads coming back out.

Q. Is it primarily in connection with your operation to Tulsa, Oklahoma?

A. I would say approximately fifty percent of it is Tinker Field, Oklahoma.

Q. What is the status of your aircraft parts business at the present time? Is it improving or decreasing?

A. Aircraft and aircraft component parts at present probably makes us eighty-five percent or better of our overall operations.

Q. Is your business increasing or decreasing?

A. Right at the present it is slightly decreased.

Q. With respect to your equipment at Indianapolis or in the Indianapolis area, how much of this equipment is van-type equipment?

A. Well, there is nearly always one van at Indianapolis. We have little use for vans coming out of Indianapolis, but there is nearly always one there. When one van comes in we [fol. 174] dispatch the one that has been there.

Q. Is that a closed van?

A. Yes, it is.

Q. Is the terminal list marked as exhibit 13 more current than the terminal list shown on the last page of your advertising brochure?

A. The one on the back of the advertising brochure should be disregarded and supplement the new one for it.

Q. Have you recently transported traffic for Boeing other than between the points here concerned?

A. Yes, we have.

Q. And will you relate the circumstances?

A. We had a recent occasion where Boeing requested us to be granted an emergency authority to transport a delicate article to Seattle, Washington due to the fact that they had had previous damage on several shipments. They supported the application and the movement was accomplished.

Q. Looking at the picture of your van on the third page of your advertising brochure, how long would it take U.S.A.C. to install a removable fixed-top on this van?

A. Possibly ten days to two weeks, depending on what

length of time would be involved in making the fixtures that would be necessary.

Q. No, just the removable top.

A. Possibly three days.

[fol. 175] Q. If the instant traffic were tendered to you would you be willing to station a closed-top van trailer at Indianapolis?

A. We would.

Q. And if the shipper assisted U.S.A.C. in the same manner it has assisted J-T in the installation of fixtures, would you install the fixtures at your own expense?

A. We would.

Q. Does U.S.A.C. Transport have security clearance?

A. Yes, we do.

Q. How many underslung does U.S.A.C. have?

A. That I do not know offhand; approximately thirty-five.

Q. Did you hear Mr. Solomon testify respecting U.S.A.C.'s tariff rule as to the control of the vehicles?

A. Yes, I did, but I didn't clearly understand what he meant by it.

Q. In general what is the purpose of that rule?

A. Only to the extent that we do not like to have a shipper overload any particular unit, and therefore we deem the necessary equipment for a particular run to eliminate breakdowns and things in transit.

Q. And what is your understanding as to the reason why the shipper has not availed itself of U.S.A.C. Transport, despite your company's solicitations?

Mr. Wrape: I will object to that. How could the witness know why somebody else doesn't do something.

[fol. 176] Exam. Cunningham: Can you qualify the witness? The objection is sustained until the witness is qualified.

Q. In connection with your official duties, Mr. Decker, have you consulted, had some relation with the sales department in regard to their recent solicitation efforts at the Wichita plant of Boeing?

A. Only to the extent that we were willing to——

Q. Have you had any relation or official connection so that you can determine what the sales representative of

U.S.A.C. Transport received at Wichita as a result of his solicitation?

A. I understand they were very well received and that they were advised that there would be in the future component parts movement from the East, and at that time they were assured that we would supply anything that was required in the line of trailers or fixtures to meet their needs.

Q. But, did your sales representative inform your office as to the reason why U.S.A.C. was not used in the present move?

Mr. Wrape: I am going to object to that; that is pure hearsay from this witness.

Exam. Cunningham: The objection is sustained until he can show that it isn't hearsay.

Q. In connection with your past experience in the transportation of delicate aircraft parts, do you consider a landing gear bulkhead which is used in the nose of a B-52 to withstand the impact of landing to be of a delicate or fragile nature?

[fol. 177] A. I do not.

Mr. Sullivan: That's all I have. I would like to offer into evidence at this time exhibits 12 through 21.

Mr. Wrape: I have no objection to them.

Exam. Cunningham: Exhibits 12 through 21 will be received in evidence.

(Protestant's exhibits Nos. 12 through 21, Witness Decker, for identification, were received in evidence.)

Cross-examination.

By Mr. Wrape:

Q. Mr. Decker, what did you say your position was?

A. I am in charge of the fleet control and overall operations of all equipment.

Q. Are you familiar with your current tariffs?

A. Pretty much so.

Q. And is it part of your duties to understand the rules and to publish the tariffs?

A. At present, no.

Q. Well, do you agree that your supplement No. 1 in FICC No. 30, which was effective April 1, 1957 has a rule 40 which reads:

"The determination of equipment to be used to transport any shipment efficiently and safely shall rest exclusively with the carrier."

You agree that that is contained in there?

A. That's correct.

[fol. 178] Q. All right; now, take your exhibit 14, sir. When you were talking about the loaded and empty trailers dispatched from given terminals, are you able to tell us which of those are vans which could be used for the transportation of components?

A. Not from the records that are here I couldn't.

Q. In other words, that includes your engine carriers, your lowboy equipment?

A. Overall dispatch of units.

Q. Now, will you agree with me that your exhibit 14 indicates in all some twenty-eight vans of various types with open roofs and closed roofs?

A. Open and closed.

Q. And that it reflects some 189 engine carriers, flat beds, and other types of trailers?

A. Correct.

Q. And I assume that you keep your fleet of a type to handle your business?

A. That is right.

Q. Now, your exhibit 21 was the Farmingdale operation. That was the F-84?

A. Correct.

Q. The last shipment shown on there was August 24, 1955. That was the end of the F-84 program, was it not?

A. The end of that particular movement for us, yes, sir.

Q. Now, on your exhibit 20, that's the Marietta, Georgia [fol. 179] movement; that was a B-47, and the program for building B-47's has been completed, has it not, sir?

A. That's correct.

Q. Your last movement was in August of '56?

A. I wouldn't exactly say the last movement was in August, '56, but the last one I show was in August, '56, and it terminated shortly after that.

Q. Now, the same is true with respect to exhibit 19, which was a B-47 movement to Tulsa. That program has been completed?

A. That is correct.

Q. And you are no longer engaged in moving that particular component?

A. That is correct.

Q. Now, do I understand from exhibit 12 that your company claims it can transport aircraft components between all of the points in the United States west or east of the Mississippi River?

A. Beg pardon again?

Q. I say, do I understand from exhibit 12 that your company claims it can transport aircraft components between each and every point located in the United States east of the Mississippi River?

Mr. Sullivan: I will object to that insofar as our authority east of the Mississippi River is not involved in this application, and even if it is I think the authority is stated in [fol. 180] a different sub number than we are discussing.

Mr. Wrape: I said exhibit 12; I didn't say the sub number.

Mr. Sullivan: We specified it as involving the proposed authorization.

Mr. Wrape: Mr. Examiner, he has put in exhibit 12. I want to ask him about that. He complains about my asking him about operations east of the river, whereas every exhibit he has put in has related almost exclusively to operations east of the river.

Exam. Cunningham: Are you objecting?

Mr. Sullivan: Yes.

Exam. Cunningham: Objection overruled.

By Mr. Wrape:

Q. Can you answer my question, sir?

A. Will you repeat it, please?

Q. Yes. Is it true that under exhibit 12 your company claims the right to be able to transport aircraft components between each and every point east of the Mississippi River in the United States?

A. To the extent of what our operating authority grants

us. I certainly wouldn't attempt—if this will help clarify what is in your mind—I wouldn't attempt to operate intrastate on that authority.

Mr. Sullivan: I don't think the witness understand counsel.

Q. With your limitations as to movements in interstate commerce, would that be true?

[fol. 181] A. Yes.

Q. Do you likewise claim under this certificate to be able to transport these aircraft components in interstate commerce between each and every point in the United States east of the Mississippi River to each and every point in the United States west of the Mississippi River?

A. Yes, if I understand you right, yes.

Exam. Cunningham: Does the exhibit show that?

Mr. Wrape: Yes, the exhibit shows that.

Q. Now, Mr. Decker, this emergency movement that you handled for Boeing of Seattle, from what origin was that?

A. Namely the state or the shipper.

Q. The city?

A. Stratford, Connecticut, to Seattle Washington.

Q. Now, in your exhibit 18, which are the B-36 wings, what are they, wings, or what?

A. Flaps.

Q. The B-36 program has long since been closed, has it not?

A. That is true. That is merely to establish the fact that we have carried that type of an operation.

Q. Is it true that the shipping fixture in that instance was made of wood?

A. Partially, not completely.

Q. Do you mean there were some metal screws in it?

A. There was metal reinforcing. There were metal [fol. 182] cradles and saddles in the bottom. The top portion that you are looking at, that is true, that is wood.

Q. And when did you handle the B-36 components?

A. That ran from 1952 until late 1954 or '55.

Q. Not late in '55; early in '55?

A. Late '54 or early '55.

Q. In your exhibit 17 what are the inside dimensions of that trailer?

A. As I recall it, the inside dimensions on that—the outside dimensions were thirty-four feet ten inches, eight foot in width and eight foot six inches in overall length.

Q. Eight foot six inches in overall length?

A. Inside.

Q. Inside?

A. That is correct.

Q. In your equipment list you show 135 special engine carriers. What are they?

A. In the upper right-hand corner, the upper left-hand corner, are both engine carriers.

Q. And the lower left-hand corner is the same kind of a trailer, isn't it?

A. Yes, with different sets of fixtures altogether on it.

Q. Are these fixtures for the carrying of engines permanently attached to the trailer?

A. No, sir.

[fol. 183] Q. You take them off on each trip?

A. They can be removed at any time they want to change to another commodity.

Mr. Wrape: Thank you, that's all.

Exam. Cunningham: Any redirect? That's all, fine.

(Witness excused.)

Mr. Sullivan: May we go off the record for just a moment, sir?

Exam. Cunningham: Off the record.

(Discussion off the record.)

Exam. Cunningham: Back on the record. The witness Mr. Solomon has been recalled by protestant counsel Brooks, and he is making him his own witness for the purpose of asking him one question, and as everyone knows here he will be bound by what he says. Go ahead.

ERNEST T. SOLOMON, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Brooks:

Q. Sir, do the articles being transported and to which you testified to here earlier carry the strain of the impact of the landing wheel of the B-52?

A. I am not——

Q. You can answer that yes or no, if you know.

Exam. Cunningham: If you don't know, just say you don't know.

[fol. 184] The Witness: I cannot say that——

Exam. Cunningham: He is not qualified as an engineer.

The Witness: I don't know whether the entire stress of the landing weight of the plane is involved on these parts. I do know this, that when they are transported as they are now without being incorporated into the body structure of the aircraft, that they are of a very critical nature dimensional-wise. If they are off a little bit they won't fit in the jigs where we make our major body section. Once those parts are in the body section I would assume from a layman's standpoint, not being an aircraft engineer, that they are in a position then to take much more strain than they would be while they are being transported without being incorporated into the major body section.

Q. All right, sir. Have you ever had any damage to the part itself; that is, the bulkhead, whether being transported by rail or by truck, to date?

A. To my knowledge we haven't had any damage on it.

Mr. Brooks: That's all.

Exam. Cunningham: That's all, thank you.

(Witness excused.)

Exam. Cunningham: Call the next witness.

Mr. Brooks: Mr. Robert Gambill.

ROBERT GAMBILL, was duly sworn and testified as follows:

[fol. 185] Direct examination.

By Mr. Brooks:

Q. State your name, please.
A. Robert Gambill.
Q. Where do you live, sir?
A. Kansas City, Missouri.
Q. With what company are you connected?
A. Belger Cartage Service, Inc., of Kansas City.
Q. And what type of business does that company engage in?
A. Heavy hauler, commonly known as heavy hauler of articles which because of their size or weight require special handling and special equipment.
Q. What is your position in the company?
A. Officially I am known as the operations manager.
Q. And how long have you been with the firm?
A. A total of about ten years.
Q. And had you had experience in that type of business prior to that time?
A. I have been in it for twenty-six consecutive years.
Q. Your company has authority from the Interstate Commerce Commission?
A. Yes, we do have.

Mr. Brooks: May we have this marked, sir?
Exam. Cunningham: It will be identified as exhibit 22.

(Document was marked protestant's exhibit 22, Witness Gambill, for identification.)

[fol. 186] Q. I hand you what has been marked as exhibit 22 and ask you if that is the authority issued to you by the Interstate Commerce Commission, to Belger Cartage Service, Inc.?
A. Yes, it is.
Q. Now, that authority in itself only covers Missouri and the State of Kansas?
A. That's correct.
Q. Can you tell me the interest of the Belger Cartage Service, Inc. in this application, sir?
A. Well, as our certificate sets out we are authorized to haul statewide in the State of Kansas from the State of

Missouri or from Kansas to Missouri, and we have entered into an arrangement with the Daniel Hamm Drayage Company of St. Louis, Missouri in an attempt to secure some of this plane part hauling from the Boeing Company of Wichita. We do not presently operate trailers of the type that have been brought out in this hearing. The Daniel Hamm Company does operate a number of that type of trailer.

Q. Now, there is a witness here from Hamm to testify concerning the equipment, is there not?

A. Yes, sir.

Q. You have seen the equipment, have you?

A. Many times.

Q. And the authority of the Hamm Company will come out later, but that includes the State of Indiana and Illinois and Missouri, is that correct?

[fol. 187] A. Yes, it does.

Q. Among other states?

A. Yes.

Mr. Brooks: May we have this marked, please, sir?

Exam. Cunningham: It will be identified as exhibit 23.

(Document was marked protestant's exhibit 23, Witness Gambill, for identification.)

Q. I hand you exhibit 23 and ask you if that is a list of equipment of Belger Cartage Service?

A. Yes, it is.

Q. And they are in operation at the present time in the area throughout Missouri and Kansas?

A. That's right.

Q. Are you members of the so-called Red Book or the Heavy and Specialized Carriers Joint Tariff No. 100B, F. H. Floyd, Agent, Washington, D. C.?

A. Yes, we are.

Q. Is Daniel Hamm Drayage Company to your knowledge also a member of that organization and a participant in the joint tariff?

A. Yes, they are.

Q. Do you know of other members of that joint tariff who have a signed contract with your company which would involve the territory covered between Indianapolis, Indiana and Wichita, Kansas?

[fol. 188] A. The R. L. Jeffries Company.

Q. R. L. Jeffries Trucking Company of Evansville, Indiana?

A. Yes, sir.

Q. Now, sir, do you operate an interchange service regularly under that Red Book plan?

A. Yes, we do.

Q. Very briefly tell us what the operation would be if a movement were made in interchange arrangements between you—that is, Belger—and the Hamm Company, between Indianapolis, Indiana and Wichita, Kansas?

A. Well, obviously, of course——

Exam. Cunningham: Can't he bring that out from the originating carrier?

Mr. Brooks: Yes, except, Mr. Examiner, this witness has done the solicitation at Wichita, which I am going into. They have an office in Wichita, and I wanted to bring it out from destination, and perhaps should have put the originating carrier on first; but, I think the results will be the same.

Exam. Cunningham: Go ahead, just so it isn't repetitious from both witnesses.

By Mr. Brooks:

Q. Will you explain the operation; tell us what you have in Wichita, what you have done to seek the business, and how the operation would work if you get the business?

[fol. 189] A. Well, we maintain a complete terminal and office facility at Wichita. We have available at Wichita service that we render at any point in the Kansas City area. It's a lesser quantity, but the service is complete as we have it in Kansas City. As I stated, we have no so-called airplane type trailers, but we have solicited that type of hauling from the Boeing Company with the understanding that we would have this interchange arrangement with the Daniel Hamm Company, whose equipment would be the equipment used, and it would be used on an interchange arrangement under this tariff 100B. The Hamm equipment, of course, would carry the load hauled away to Wichita.

Q. From origin point of Indianapolis?

A. From Indianapolis.

Q. Would the driver be the same?

A. No, we have not.

Mr. Wrape: Thank you, that's all.

Exam. Cunningham: Any redirect?

Mr. Brooks: No redirect; I would like to offer exhibits 22 and 23.

Mr. Wrape: I have no objections.

Exam. Cunningham: Exhibits 22 and 23 will be received.

(Protestant's exhibits 22 and 23, Witness Gambill, for identification, were received in evidence.)

(Witness excused.)

[fol. 193] (Discussion off the record.)

Exam. Cunningham: Back on the record.

ANDREW SARGENT, was duly sworn and testified as follows:

Direct Examination.

By Mr. Brooks:

Q. State your name, please.

A. Andrew Sargent.

Q. Where do you live?

A. 6200 Nagel Avenue, St. Louis, Missouri.

Q. With what company are you connected?

A. Daniel Hamm Drayage Company.

Q. What kind of business does Daniel Hamm Drayage Company do?

A. Heavy and specialized hauling and freight and appliance delivery. There are five or six different departments of Daniel Hamm Drayage.

Q. What is your association with the company?

A. I am the manager of the heavy specialized hauling department.

Q. And before your service with Hamm had you had experience with other heavy haulers prior to that?

A. Yes, I have, with Arthur Morgan, South Hampton Hauling Company, Wilford Heavy Hauling Company, twenty years of association with the heavy hauling business.

Mr. Brooks: May we have this marked, sir?
Exam. Cunningham: It will be identified as exhibit 24.

[fol. 194] (Document was marked protestant's exhibit 24, Witness Sargent, for identification.)

Q. I hand you what has been marked exhibit 24 and ask you if that is the authority issued by the Commission in MC 42963, Sub 2?
A. That is right.
Q. And for the matter concerned here authority is granted between the states of Missouri, Illinois and Indiana, is that correct?
A. That's correct.

Mr. Brooks: May we have this marked, sir?
Exam. Cunningham: It will be identified as exhibit 25.

(Document was marked protestant's exhibit 25, Witness Sargent, for identification.)

Q. I hand you what has been marked exhibit 25 and ask you to identify that briefly, please.
A. It is a true picture of the equipment owned by Daniel Hamm Drayage.
Q. As of June 1st, 1957?
A. That's right.
Q. Now, sir, you have heard the testimony here today?
A. Yes, I have.
Q. Tell us what pieces of equipment would be suitable in your opinion for the transportation of the commodities involved?
A. Well, here is a unit on the first page. Here is unit No. [fol. 195] 542 and 543.

Exam. Cunningham: What page is that on?
Mr. Brooks: Page one, I believe, Mr. Examiner, the last two items.

By Mr. Brooks:

Q. You are referring to the item marked "airplane trailers"?
A. That's right.
Q. The last two items on page one?
A. Yes. Page seven, unit 557, 558, unit 564; page eight,

A. That is correct; we have transported wings to California.

Q. Have there been any delays to your knowledge in that type of movement by interchange?

A. No delays whatsoever; interchange is prearranged and it is a through shipment.

Q. You already have your master contract signed?

A. Yes, sir.

Q. And the signs of the Belger Cartage Company and the Hamm Company are capable of being put on the Hamm equipment when you reach the point of interchange?

A. That is right.

Q. Inspection would be made at Kansas City, Missouri [fol. 199] at the office of Belger Cartage Service?

A. That is right.

Q. Is this type of business desirable to your company?

A. Yes, it is, due to having three trailers setting. We would sure like to put them to work; can't use them for anything else.

Mr. Brooks: I believe that's all.

Exam. Cunningham: Did you say it would interline with Belger at the Missouri line?

The Witness: Belger overlaps over our authority. We both have Missouri authority.

Exam. Cunningham: Where would you actually interline? Would it be at the state line or at a specific point.

The Witness: It would be a specific point.

Exam. Cunningham: Like where?

The Witness: It would be Independence, Missouri, it could be Kansas City, Missouri.

Exam. Cunningham: Cross examine.

Cross-examination.

By Mr. Wrape:

Q. Let's see, Mr. Witness. Which of the trailers are you using presently now in your airplane movement?

A. The ones that have wing trailers.

Q. The ones that say "wing trailers"?

A. Yes, sir.

Q. And those are all the ones except the two on page one, is that correct?

[fol. 200] A. Yes, sir, these two airplane trailers, they are being converted to wing trailers, and we can use them on a movement without getting special permits from the state.

Q. Aren't they over length or are you cutting the length off of them?

A. We have cab-over engine tractors; several of them are sleeper cabs. Our wing shipment is a through shipment; there is no stop.

Q. I understand that's the movement from—

A. *Bulkmore* to McDonald, and we can offer the same service to any other shipper.

Q. And you are using the trailers that you describe on exhibit 25 as wing trailers?

A. Yes, sir.

Q. On the McDonald movement?

A. That's right, sir.

Q. Now, these two that you are converting, they have canvas tops, do they not?

A. Yes, sir, they do.

Q. And they were the ones that you used to operate down into Texas?

A. Tulsa, Oklahoma.

Q. Tulsa, Oklahoma?

A. Yes.

Q. They are 1940?

[fol. 201] A. That's right.

Q. Now, have you discussed with anyone at Boeing whether or not this component can be safely handled with a gantry crane?

A. No, sir, I haven't; but, Boeing is aware of our services.

Q. Have you discussed with anyone at Boeing the handling of this particular component on a monorail or a sling arrangement?

A. Mr. Wrape, today is my first day of ever knowing that J-T was hauling this commodity.

Q. Now, as I understand it you have never interlined any aircraft component with Belger? Belger says he has never handled any.

A. No, everything has to go to Tulsa. We interline with



61.0

A. In all probability the same driver, the same truck all the way.

Q. How many times have you solicited the business from the Boeing Company, yourself personally?

A. I personally have been in there about five times. I haven't been down there for the past couple of years; we turned it over to our Wichita manager.

Q. Does his work head up under you as operation manager?

A. Yes, it does.

Q. Does he advise you that further solicitation has been [fol. 190] made in Wichita?

A. Well, he advised me that it has been made and he told me he didn't think there was much point in pursuing it any further.

Q. When you yourself solicited the business did you offer the Red Book service; that is, the service under the Red Book plan?

Exam. Cunningham: His business wasn't in existence when he solicited it, was it?

Mr. Brooks: A similar type of business, Mr. Examiner.

Exam. Cunningham: From Indianapolis to Wichita?

Mr. Brooks: It was between two other points.

Exam. Cunningham: That wouldn't make any difference here.

Q. Well, sir, did you explain to Mr.—is it Eldridge?

A. Mr. Eldridge was the gentleman with whom I talked.

Q. Was he the traffic manager at that time?

A. I believe he was; he was the gentleman I was directed to. The first time I was down there I think I waited three hours in the lobby, but I finally got in and I think I wound up with Mr. Eldridge. He was in the traffic department; of course, I didn't know whether he was the traffic manager or one of the assistants.

Q. Did you leave all the tariffs and the Red Book tariff and the rates and the service with him?

A. I gave him a copy of the tariff and explained it to him as best I could, how the particular thing operated, because [fol. 191] some of these fellows are not too familiar with these heavy haulers over irregular routes with special commodities.

Q. Have you ever received any of the business?

A. I don't to my knowledge know of a dollar's worth of business we have ever hauled over the road for the Boeing Company. We have done some local work at the Boeing plant.

Q. Do you have drivers with security clearance?

A. Yes, we do; I have it myself also.

Mr. Brooks: I believe that's all.

Exam. Cunningham: Cross examine.

Cross-examination.

By Mr. Wrape:

Q. The local work was in the nature of rigging?

A. Well, to clarify the thing, we have never done any work to my knowledge and billed it to the Boeing plant. We have done quite a bit of work in and around the Boeing plant, but always for a contractor who was in turn working for Boeing, and it could be in most cases construed as rigging, although we have done a good deal of local trucking work for the contractors working at Boeing.

Q. You mean you haul the contractor's machinery into the Boeing plant?

A. No, we have also moved heavy machinery tool equipment that was going to be installed in the Boeing plant; we have unloaded it from the cars.

Q. That's the usual type of business a heavy hauler en-

[fol. 192] gages in, is it not?

A. In the local line, yes.

Q. Now, when was it that you solicited Mr. Eldridge?

A. I haven't been in there myself for, oh, since early 1955, I am sure, because that's when our present manager took over down there. There were several men in the traffic department down there, and it is a huge place, of course, and it is next to impossible from my own experience to see the same man twice, and when you go in there you might as well go early in the day because it usually took me the greater part of the day to see one man; and, of course, I saw *however* was available that they would direct me to.

Q. I suppose they are busy. Now, Mr. Gambill, as I understand it, your company has not engaged in the transportation of any aircraft components?

unit 578, unit 586, unit 589. One of these so-called airplane trailers has been converted; they are ten foot. One has been converted to a wing trailer and has been cut down eight feet, and the other two are in the process of being cut down to eight feet, and they lay approximately eight to nine inches off the ground.

Q. Now, sir, in pointing to exhibit 16 submitted by the U.S.A.C. on page three where these pictures depict the equipment of U.S.A.C., does the center picture on the right, is that similar to the airplane trailer of the Daniel Hamm Drayage Company?

A. Very similar, only I believe the lower beam is higher off the ground on the Daniel Hamm trailer in appearance. Appearances may be deceiving, but from appearance it looks like it may be a foot or a little more, but the Hamm's trailer bottom beam is lower.

[fol. 196] Q. I see. Now, how would you transport a load from Indianapolis, Indiana to Wichita, Kansas if the business was offered?

A. How?

Q. Yes.

A. Well, we would interchange with Belger at the Kansas-Missouri line.

Q. You both have the State of Missouri?

A. We both have the State of Missouri; Belger has an overlapping authority.

Q. And would you convert a trailer to the specifications and requirements of the applicant or the shipper witnesses in this case?

A. Yes, we would without too much trouble.

Q. Is there any other way, sir, in your opinion in which this load might be loaded and unloaded other than by this elevator arrangement which was discussed earlier?

A. Offhand I would say there would be two different ways, by the use of a gantry or by the use of a monorail with a trolley and a chain block with slings.

Q. Sir, are any of these airplane trailers idle at the present time?

A. Yes, we have three of them idle.

Q. I see. Has one of your arrangements for two of these trailers now been completed?

A. Yes.

[fol. 197] Q. And they are sitting in your yard at the present time?

A. There is one more which will be this week back in the yard; two of them are completed and one should be completed by Friday.

Q. I see. Would you station that equipment at Indianapolis, Indiana at the office of the H. & B. American Machine Company?

A. Yes, we would.

Q. And would you set that off to the service of Boeing Aircraft if service of three or four loads a month were given your company in connection with Belger?

A. We absolutely would.

Q. Is this the type of business that your drivers have experience in handling?

A. Definitely; we have been doing this type of hauling for, I would say, the last seven, eight years. We have been hauling wings from Baltimore to the McDonald Aircraft Plant at St. Louis, Missouri.

Q. Are those numerous movements a week?

A. Yes, there are. There is three to four movements a week, and I understand that it will be thirty-three movements a month by the time that March rolls around.

Q. Have you also moved to the west to Tulsa, Oklahoma, out of St. Charles?

A. Yes, fuselages.

Q. Airplane fuselages?

A. Yes, sir.

[fol. 198] Q. Was that a steady movement several times a week?

A. That was for a period of about two years, I believe.

Q. That arrangement is now completed?

A. That's right; in fact these trailers I mentioned were for that movement, the ones that are being cut down.

Q. They are the ones that are idle?

A. Yes, sir.

Q. With all of the movement you have ever made of these airplane assemblies through the interchange under the Red Book plan both to Tulsa, Oklahoma for a matter of two years regularly each week, and now to Baltimore—

A. Yes.

Q. —out of McDonald Aircraft plant in St. Louis?

either American Storage & Transfer, or possibly Gulf Southwestern.

Q. Well now, didn't you recently file an application in which you sought a single line certificate because of the unsatisfactory service that was resulting from this Belger interline?

A. Not to my knowledge, Mr. Wrape.

Q. You don't know anything about that?

A. No, sir.

Q. The Commission denied the application?

A. I don't know anything about that.

Q. Mr. Hamm usually handles these I.C.C. matters, doesn't he?

A. That's right.

Q. Now, I am interested in this movement. I have heard of this Red Book, Blue Book, whatever it is. Let's take a [fol. 202] typical speculative movement from Indianapolis to Wichita, and we are using one of these 1940 converted trailers. Whose driver would be on it at Indianapolis?

A. The Daniel Hamm driver.

Q. Who would dispatch that unit?

A. Daniel Hamm Drayage.

Q. Who would pay the expenses of operation?

A. Daniel Hamm Drayage.

Q. And who would direct the backing up of the unit at Boeing when it finally got there?

A. I believe it would be up to Boeing to have someone out there.

Q. Would it still be your driver on it?

A. Definitely, yes, sir.

Q. Now, would there be any necessity for your driver to contact a member of Belger's en route and cause any delay by that contact?

A. That would be arranged whereby possibly it would be about the time of the driver's layover; in other words, that he would have his ten hours' driving time in and then the Belger Company would inspect the truck for operation under its authority.

Mr. Wrape: That's all.

Exam. Cunningham: Any redirect?

Redirect Examination.

By Mr. Brooks:

Q. Do your drivers have security clearance from the Air Force?

A. Yes, we have ten drivers on this wing hauling that have clearance, and we have seven drivers that have the [fol. 203] highest type of clearance that you can possibly get. It takes about three months to screen a man. They are involved in atomic energy.

Mr. Brooks: I see; that's all, and I would like to offer exhibits 24 and 25.

Mr. Wrape: No objection.

Exam. Cunningham: Exhibits 24 and 25 will be received in evidence.

(Protestant's exhibits 24 and 25, Witness Sargent, for identification, were received in evidence.)

Exam. Cunningham: That's all.

(Witness excused.)

Exam. Cunningham: Are you ready to proceed?

Mr. McHendrie: Mr. Walker.

David J. Walker, was duly sworn and testified as follows:

Direct Examination.

By Mr. McHendrie:

Q. What is your name and address?

A. My name is David J. Walker, 80 East Jackson Boulevard, Chicago, Illinois.

Q. Are you connected with the Atchison, Topeka, and Santa Fe Railway Company?

A. Yes, sir, I have been employed by the Atchison, Topeka & Santa Fe for the past twenty-five years, the last five of which were spent in the commerce bureau of [fol. 204] that company with headquarters at Chicago.

Q. What is your present title, Mr. Walker?

A. I am a commerce clerk in that company.

Q. Mr. Walker, do you know whether or not the Santa Fe Railroad participated in rail movement of this particular component part from the H. & B. plant at Indianapolis to Boeing Aircraft Company?

A. Yes, we did during 1956.

Q. Did you receive those shipments from another carrier or carriers?

A. Yes, sir.

Q. At what point?

A. Kansas City, from the Wabash.

Q. Have you prepared an exhibit portraying the readiness and ability of the Atchison, Topeka & Santa Fe Railway Company to handle this movement or participate in it?

A. Yes, sir.

Mr. McHendrie: May I have the exhibit numbered, please?

Exam. Cunningham: It will be identified as exhibit No. 26.

(Document was marked Protestant's exhibit 26, Witness Walker, for identification.)

Mr. McHendrie: Counsel indicated they would stipulate as to the admission of this exhibit.

Mr. Wrape: We will, sir.

Exam. Cunningham: Is this your only exhibit?

[fol. 205] Mr. McHendrie: This is our only exhibit.

Exam. Cunningham: Do you want to offer it at this time?

Mr. McHendrie: I offer it at this time and tender the witness for cross examination.

Exam. Cunningham: Do you agree to the stipulation that this exhibit 26 may be received in evidence?

Mr. Wrape: I do.

Exam. Cunningham: And purports to show what is therein?

Mr. Wrape: I do.

Exam. Cunningham: Exhibit 26 will be received.

(Protestant's exhibit 26, Witness Walker, for identification, was received in evidence.)

Exam. Cunningham: Cross examine.
Mr. Wrape: No cross examination.
Exam. Cunningham: That's all, thank you.

(Witness excused.)

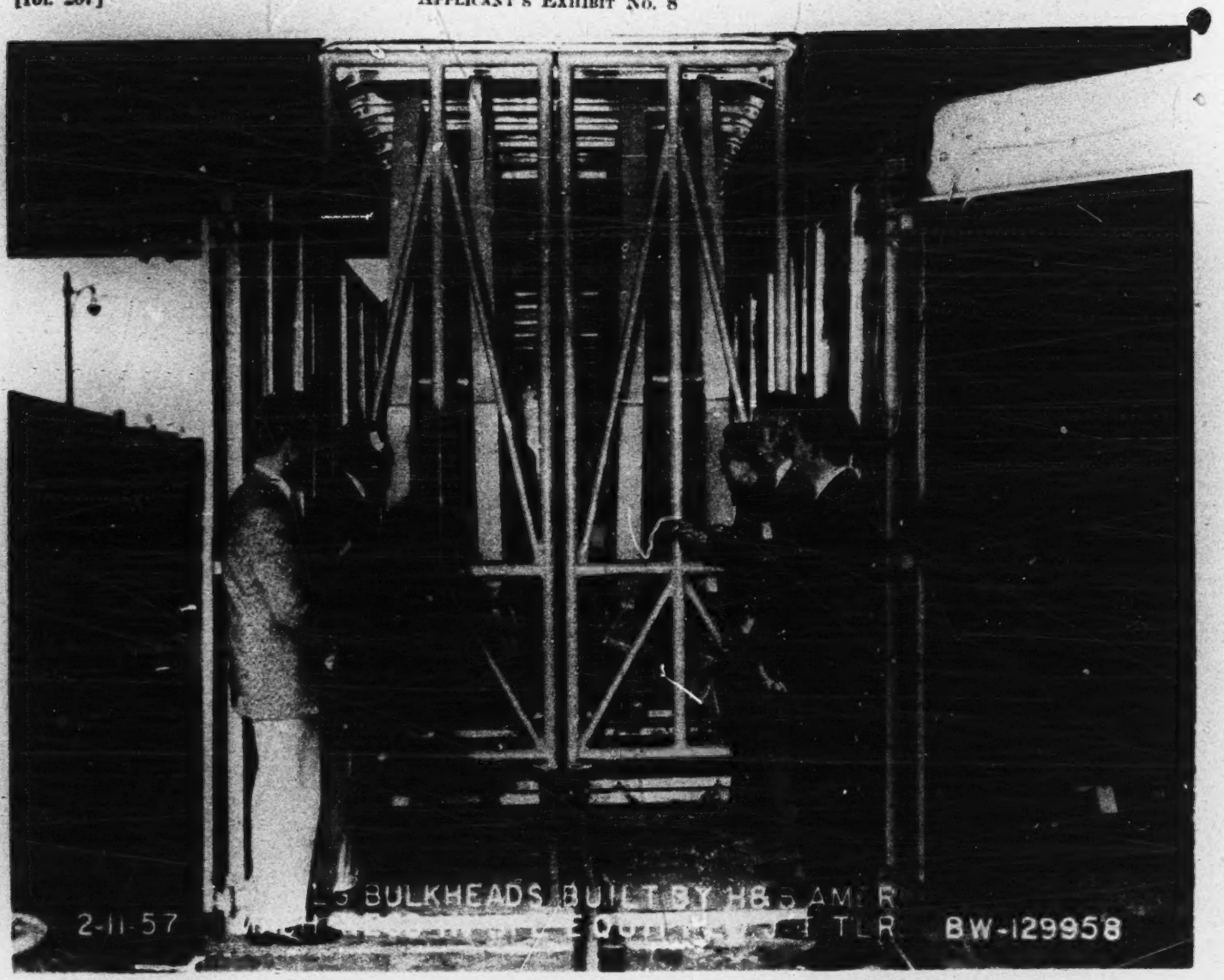
Exam. Cunningham: Anything further in this proceeding? Do the parties desire to file briefs?
Mr. Wrape: I don't.
Exam. Cunningham: If there is nothing further the hearing in No. MC 11185, Sub. 102, is closed.

(At 2:50 p.m., May 23, 1957, hearing closed.)

[fol. 213] PROTESTANTS' EXHIBIT No. 16

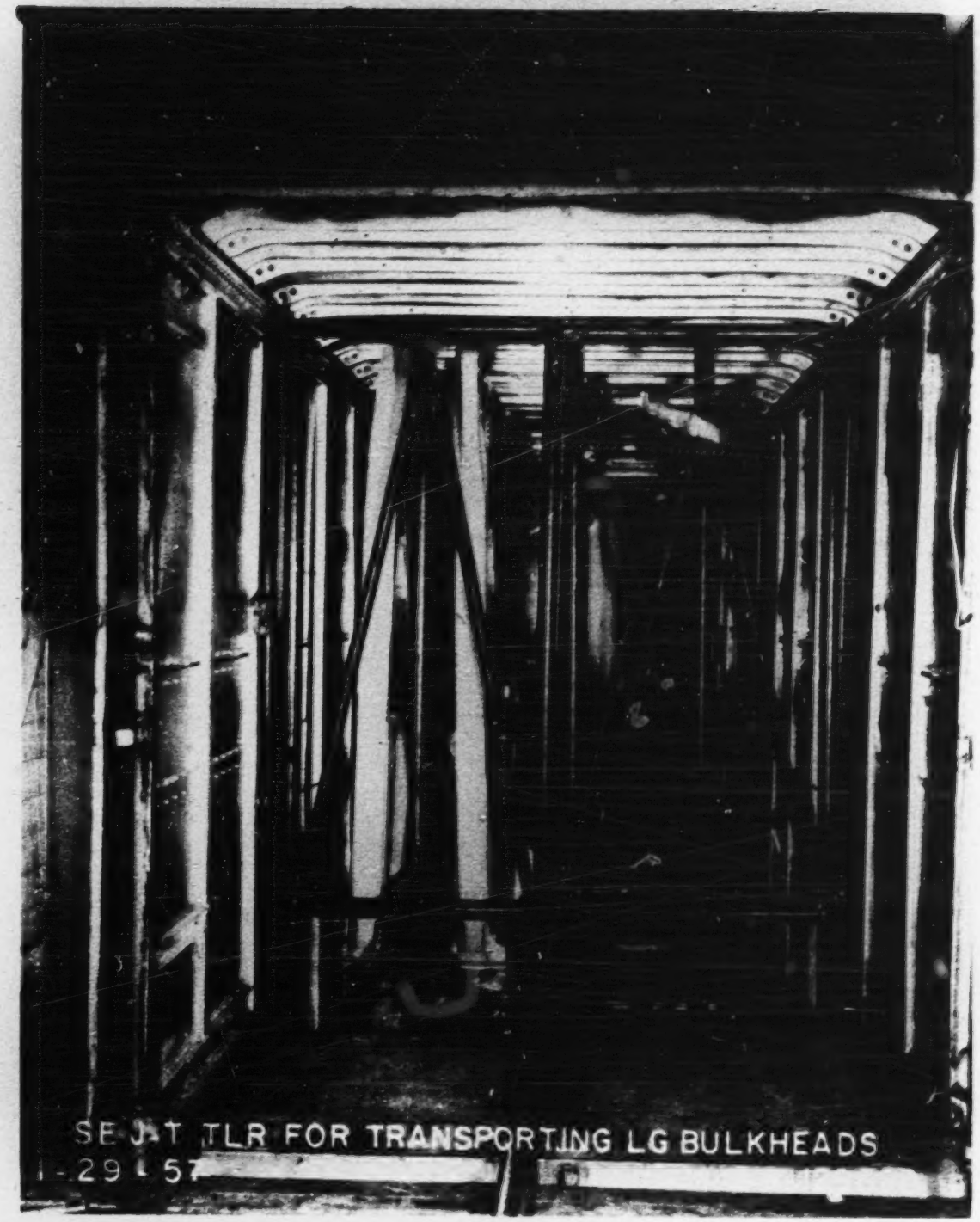


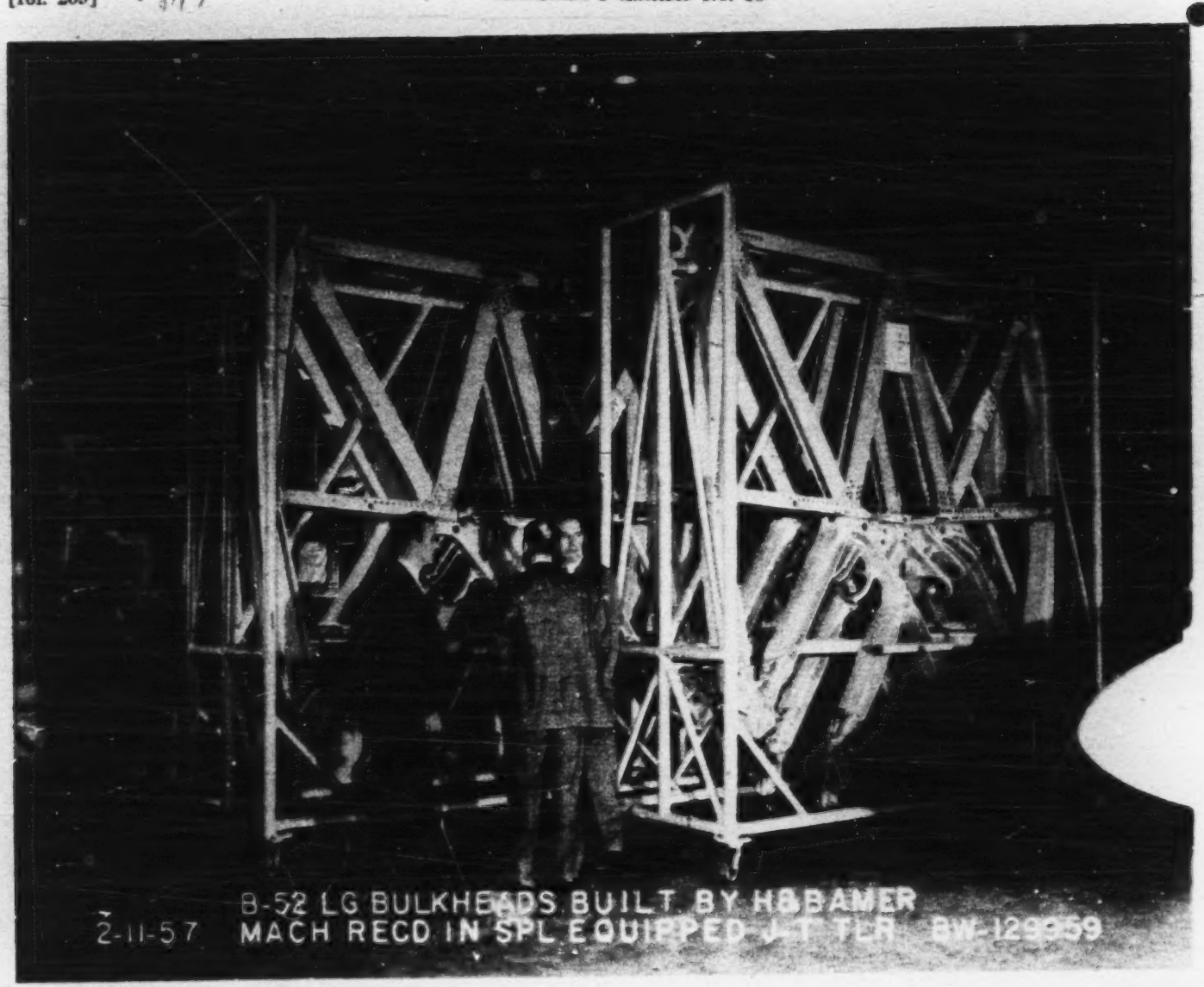
[fol. 207] APPLICANT'S EXHIBIT No. 8



[fol. 208]

APPLICANT'S EXHIBIT No. 9




B-52 LG BULKHEADS BUILT BY H&B AMER
2-11-57 MACH RECD IN SPL EQUIPPED J-T TER BW-129859

[fol. 210] 017

APPLICANT'S EXHIBIT No. 11



[fol. 211]

PROTESTANTS' EXHIBIT NO. 14

U.S.A.C. TRANSPORT INC.,
457 West Fort Street
Detroit 26, Michigan

MC-108068

EQUIPMENT DISTRIBUTION BY TERMINALS

TERMINAL	TRACTORS	TRAILERS
Dover, Delaware	34	51
Middletown, Pennsylvania	35	27
Warner Robins, Georgia	3	5
Hialeah, Florida	18	14
Mobile, Alabama	53	55
Indianapolis, Indiana	17	15
Dallas, Texas	9	8
Salt Lake City, Utah	2	4
Mishawaka, Indiana	2	5
Montebello, California	12	19
Unassigned (Float)		24

[fol. 212]

PROTESTANTS' EXHIBIT No. 15

147

U.S.A.C. TRANSPORT INC.,
457 West Fort Street
Detroit 26, Michigan
MC-108068

EQUIPMENT AVAILABLE MAY 15, 1957

No. Units	Type	Type of Body	Length	Avg. Capacity
142	Tractors	Conventional		
43	Tractors	Sleepers		
35	Semi-Trailers	Single Axle Flat Bed	32 Ft.	24,000
10	Semi-Trailers	Tandem Axle Flat Bed	34 Ft.	32,000
6	Semi Trailers	Missile Carrier Flat Bed	43 Ft.	24,000
5	Semi-Trailers	Open Top Vans	32 Ft.	24,000
2	Semi-Trailers	Removable Roof Vans	32 Ft.	24,000
2	Semi-Trailers	Tandem Axle Vans	34 Ft.	32,000
16	Semi-Trailers	Closed Vans	32 Ft.	24,000
2	Semi-Trailers	Special Open Top Vans	60 Ft.	24,000
135	Semi-Trailers	Special Engine Carriers	34 Ft.	24,000
11	Semi-Trailers	Heavy Duty Low Boys-T/Axle	35 Ft.	40,000
2	Semi-Trailers	Special Low Bed Machine Type	35 Ft.	23,000
1	Semi-Trailer	Single Axle S/W Special Aircraft	34 Ft.	12,000

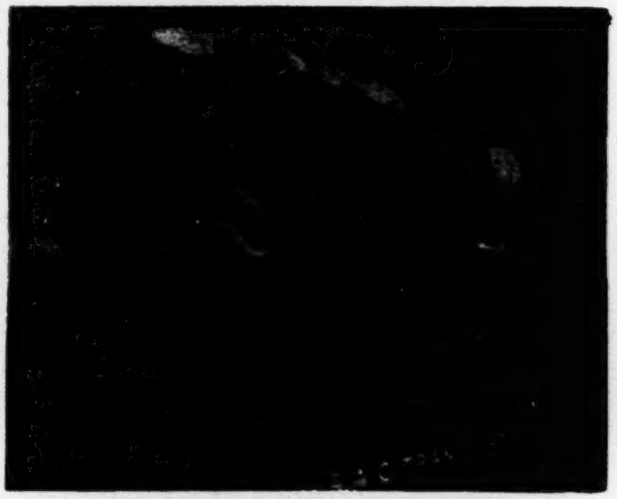
[fol. 219]



Moving a fuselage.



Heavy duty low-boy trailer — 30 ton capacity.



Wing sections cradled on a low-boy.

[fol. 220]

U.S.A.C. TRANSPORT, INC.

~~Administrative Office~~
~~3703 Bonita St., S.E.~~ USAC TRANSPORT, INC.
~~WASHINGTON 23, D. C.~~ 457 W. Fort Street
~~Jordan 8-7455~~ Detroit 26, Michigan

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A. P. JACOBSON
Vice-Pres.

W. J. NORBET
Secy.

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GReenwood 9-5291

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VIctoria 9-1228
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97266 95811

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Dover 5791

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CHarleston 4-9453

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FRanklin 7427
HArwood 2103

Agencies

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San Leandro
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ELgin 1-5800

CONNECTICUT
Bridgeport
283 Kossuth St.
FOrest 7-4144

GEORGIA
East Point
(Atlanta)
1631 Willingham Dr.
POplar 7-0577

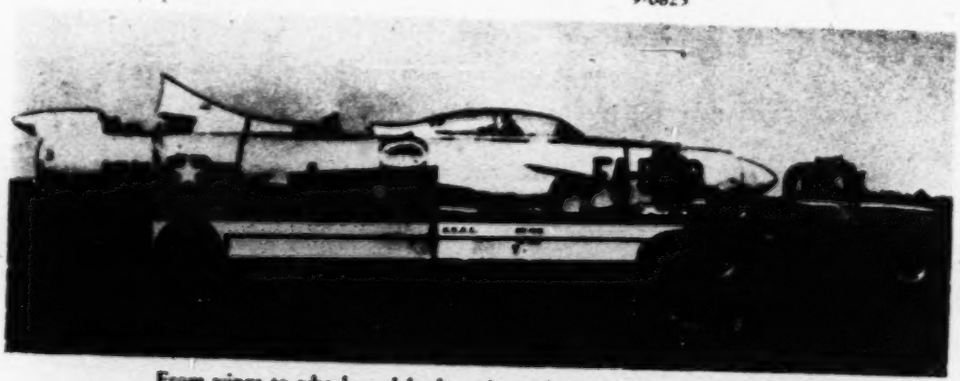
NEW MEXICO
Tucumcari
Junction 66 & 54
355 J

OHIO
Cincinnati
5550 Este Avenue
VAlley 1-6544

OHIO
Springfield
2730 Columbus Ave.
FAirfax 3-4606

OREGON
Portland
5585 N. Lagune St.
BUtler 9-1175

UTAH
Salt Lake City
1733 Beck St.
9-0823



From wings to wheels and back again, with little labor or lost time.

[fol. 214]

WHAT HAS HAPPENED

Our ability to serve the Aircraft, Heavy Equipment Industry, and the Department of National Defense, has increased tremendously during the past year. In offering our services in the Forty-eight States and Alaska, our fleet of tractors and specialized trailers has been greatly augmented and scores of trained, experienced drivers have been added to our staff.

Under new management since October 1955, U.S.A.C. Transport, Inc., is directed by men who are dedicated to the principle of giving unequalled service, and to the designing and development of equipment specifically suited for this type of specialized cargo.

WE CAN SERVE YOU WELL

To serve you promptly and conveniently, U.S.A.C. Transport, Inc., has established terminals at various locations throughout the country. To effectively serve the Aircraft, Heavy Equipment Industries, and the Dept. of National Defense, we are prepared to add more facilities as needed.

The nation-wide service which we offer, expedites the safe and efficient handling of critical defense materiel, and assures the steady flow of aircraft, aircraft engines, other aircraft component parts, and heavy machinery, between United States Army, Air Force, Navy and Marine Corps installations and Ports of Embarkation.

It is our mission to reduce the time span in transportation between the various segments of the industries we serve. Knowing the value of prompt service, we have provided the facilities, equipment and qualified personnel to transport complete aircraft, fuselages, wings, control surfaces, aircraft instruments and equipment as well as heavy machinery, on short notice—promptly and with special care, to insure satisfaction.

WHAT WE CAN DO!

We take pride in our ability and knowledge of the special preparations required to transport over-dimensional, over-weight, expensive and sometimes delicate cargoes.

May we have the privilege of handling your next shipment?

[fol. 215]

Scope of Operating Authority

Operating in interstate or foreign commerce to the extent of the operating rights set forth below, enabling us to give direct service, eliminating exchange of equipment and driver personnel.
OVER IRREGULAR ROUTES:

I.C.C. Certificate MC-108068:

Grounded and disabled airplanes and uncrated airplane parts,
Between points and places in that part of the United States east of a line beginning at the mouth of the Mississippi River and extending along that river to its source near Grand Rapids, Minn., thence along a line extending in a northerly direction to the boundary of the United States and Canada at Pelland, Minn.

RESTRICTION: Traffic in grounded and disabled airplanes is restricted to movements from the points at which such planes are located, and that in uncrated airplane parts is restricted to movements to such points.

Airplanes and airplane parts,
Between Nashville, Tenn., and Hagerstown, Md.
Such commodities as contractors' equipment, heavy and bulky articles, machinery and machine parts, and articles requiring specialized handling or rigging,

Between points and places in North Carolina, Virginia, West Virginia, Delaware, Maryland, New Jersey, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, Ohio, Illinois, Indiana, and the District of Columbia.

Certificate MC-108068 Sub 12:

Aircraft, fully assembled or partially dismantled, and *component parts,* of any partially dismantled unit of aircraft moving in connection therewith, *aircraft parts,* crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, and *special facilities and empty containers* used by said carrier in the transportation of the transportation of the above described aircraft and aircraft parts, over irregular routes,

Between points and places in that part of hte United States east of a line beginning at the mouth of the Mississippi River and extending along that river to its source near Grand Rapids, Minn., thence along a line extending in a northerly direction to the boundary of the United States and Canada at Pelland, Minn.
Between the points and places described above, on the one hand, and on the other, points and places in that part of the United States west of the above-described line.

Certificate MC-108068 Sub 20:

Aircraft, assembled or dismantled, and *component parts* of any partially dismantled unit of aircraft moving in connection therewith, *aircraft parts,* crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, for aircraft or component parts thereof which have had a prior movement, and *special facilities and empty containers* used by said carrier in the transportation of the above described aircraft and aircraft parts, over irregular routes,

Between points in Robertson Township, St. Louis County, Mo. on the one hand, and, on the other, Muroc Air Force Base, Calif., traversing Arizona, Arkansas, Colorado, Iowa, Idaho, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Utah, and Wyoming for operating convenience only.

Certificate MC-108068 Sub 23:

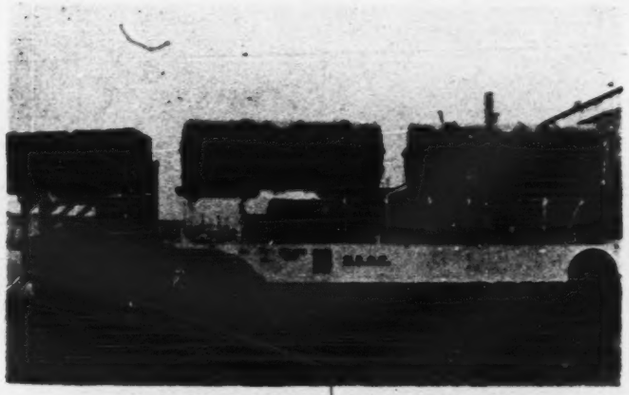
General commodities, except new passenger automobiles, commodities moving in tank vehicles and dangerous explosives,

Between all points in the United States on the one hand, and Ports of Entry on the Pacific Coast and those on the United States-Canadian boundary line, on the other, over irregular routes, restricted to traffic moving to he territory of Alaska on Unied States government bills of lading.

NOTE: Shipments are to be loaded and secured on carrier's equipment by consignor and are to be unloaded from such equipment by consignee.

[fol. 216]

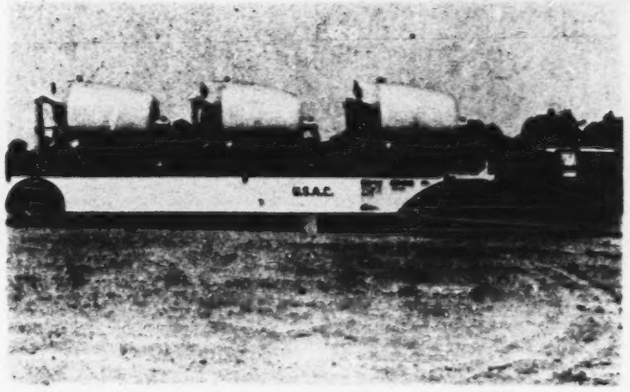
Unusual cargoes are the usual thing for U.S.A.C. as shown in the following photographs.



A load from Aircraft Engine Division, Ford Motor Co. — 3 cans 16 feet long with 2 after burners.

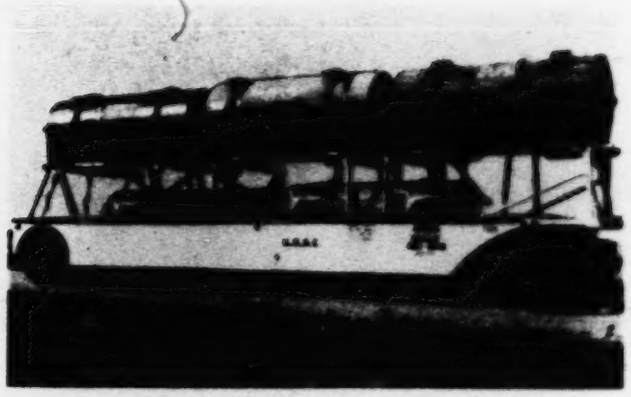


Trailer used for uncrated aircraft parts, transported on built-in fixtures.



Three Power-Pax on convertible flat.

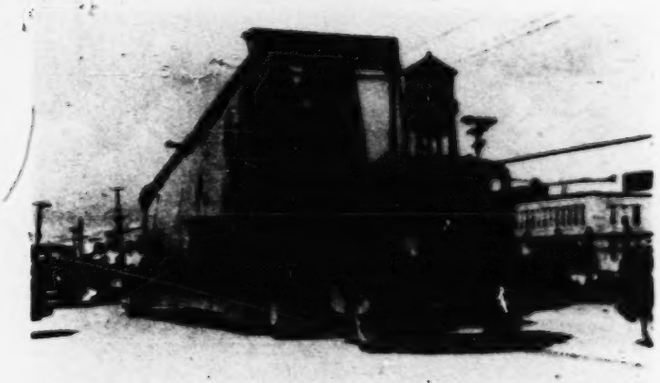
[fol. 217]



Five cans—engines.



Fuselage and wings on tandem low-boy—custom built.



Wing panels cradled on custom low-boy.

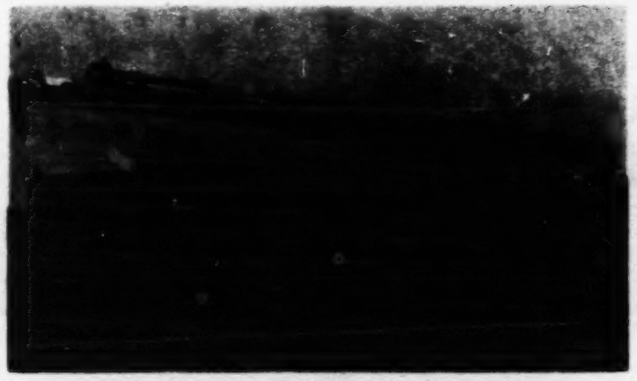
[fol. 218]



Cradled fuselage on high-boy flat.

A large cabin cruiser on heavy low-boy.

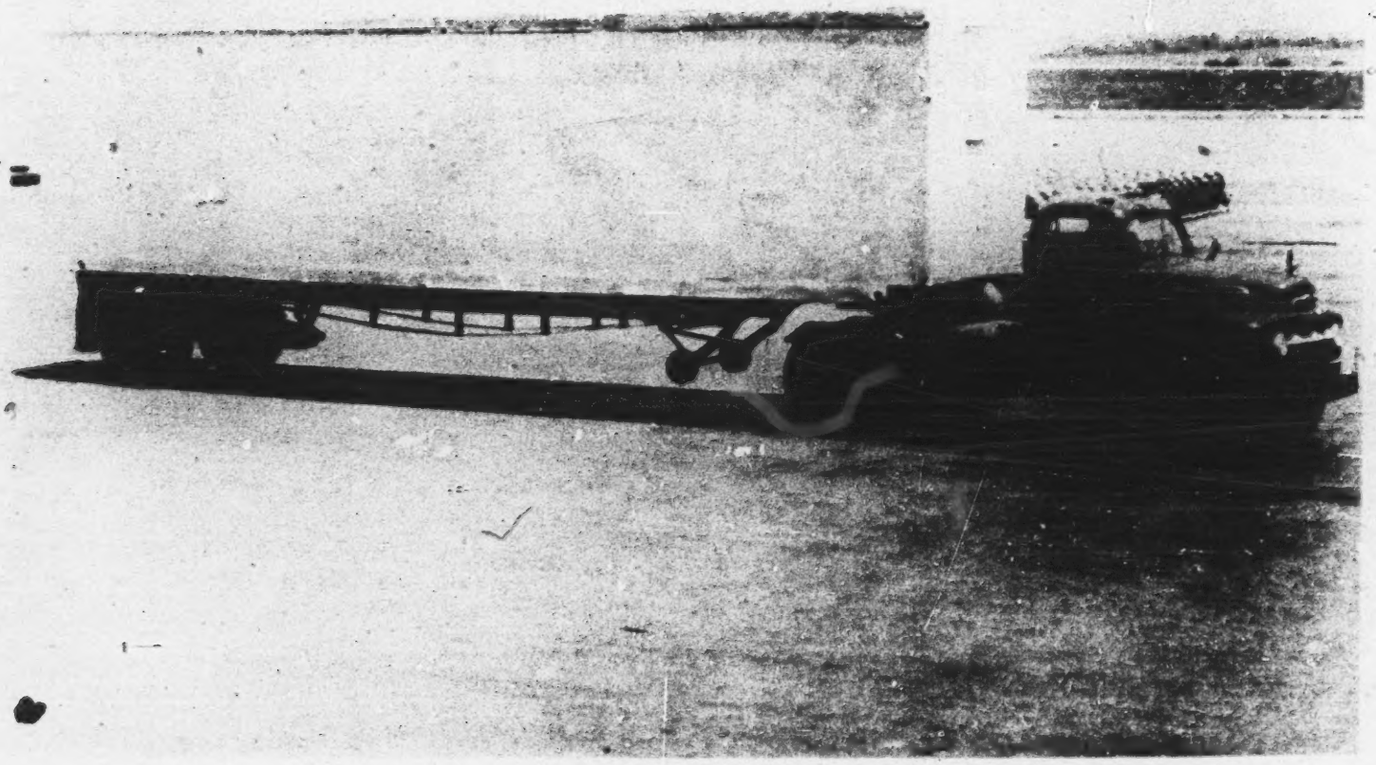




Television antenna.

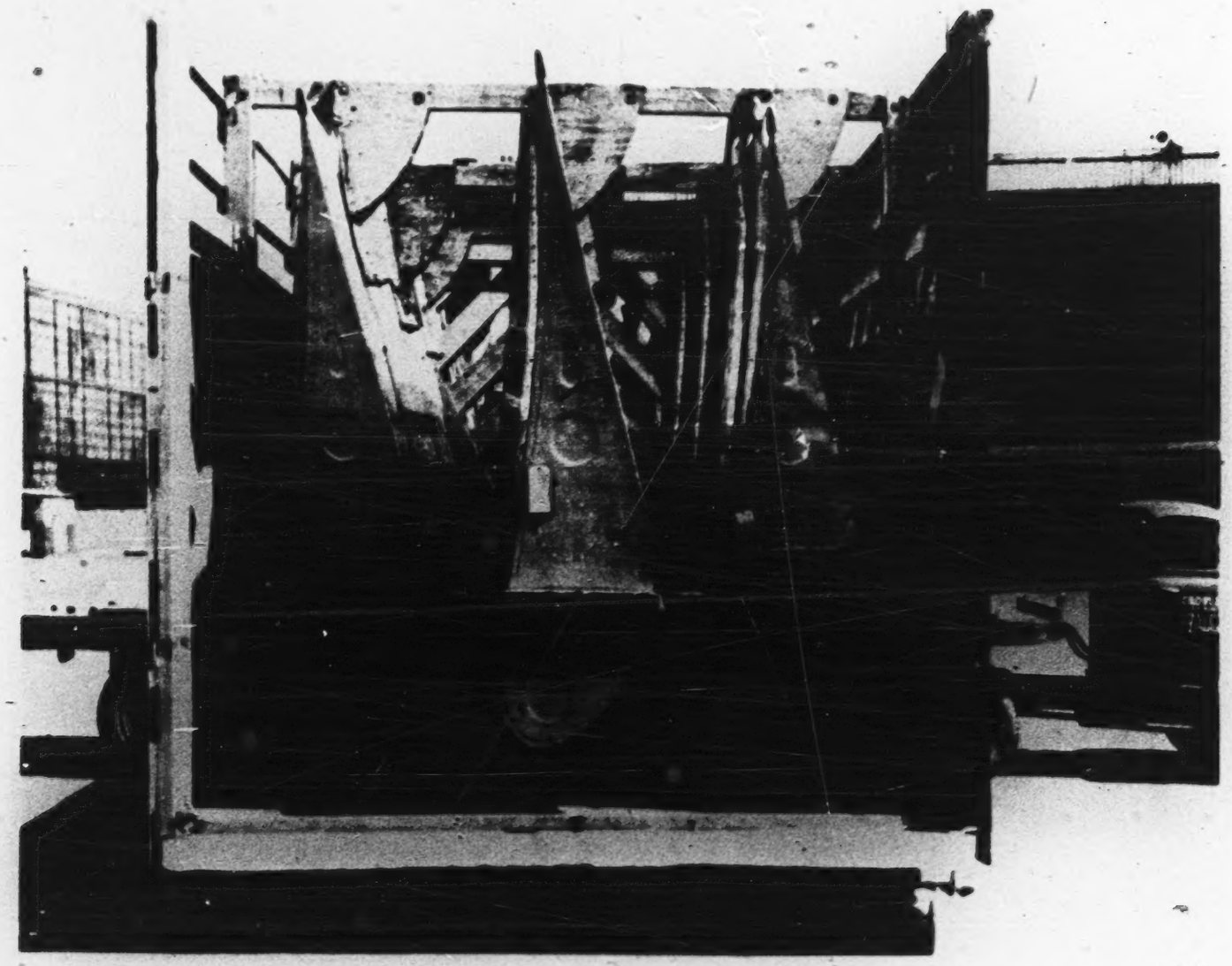
[fol. 221] 10

PROTESTANTS' EXHIBIT No. 17



[fol. 222]

PROTESTANTS' EXHIBIT No. 18



157

[fol. 223] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

J-T TRANSPORT COMPANY, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

JUDGMENT—August 9, 1960

Before Johnsen and Matthes, Circuit Judges, and Smith, District Judge.

This opinion prepared by Judge Smith and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto.

It is hereby ordered, adjudged and decreed that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

Harvey M. Johnsen, Circuit Judge. M. C. Matthes, Circuit Judge. R. Jasper Smith, District Judge.

[fol. 224] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

J-T TRANSPORT COMPANY, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

OPINION—August 9, 1960

Before Johnsen and Matthes, Circuit Judges, and Smith, District Judge.

Smith, District Judge.

This is an action brought under Sections 1336, 1398, 2284, and 2321 to 2325, inclusive, of Title 28, United States Code, to enjoin, set aside and annul orders of the Interstate Commerce Commission dated January 31, 1958, and June 15, 1959, and to compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff in a proceeding under Section 209(b) of the Interstate Commerce Act (49 U.S.C.A., 309(b)), to grant to plaintiff a permit as a contract carrier of certain property by motor vehicle from Indianapolis, Indiana, to Wichita, Kansas. By leave of Court Contract Carrier Conference of American Trucking Association, Inc. and Aerospace Industries Association of America, Inc., as Intervening Plaintiffs, and U.S.A.C. Transport, Inc., Regular Common Carrier Conference of American Trucking Association, Inc,, and Common Carrier Conference—Irregular Route—of American Trucking Association, Inc., as Intervening Defendants, were allowed to intervene and file briefs.

Since 1953, plaintiff has held certain irregular route permits from the Commission as a contract carrier of property [fol. 225] by motor vehicle. On March 14, 1957, it filed its application for an additional irregular route permit to authorize an extension of its operations in transporting aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis to Wichita. The application is supported by

Boeing Aircraft Company, which operates a plant at Wichita for the production of airplanes.

The specific commodities to be transported are "landing gear bulkheads". They are purchased by Boeing from a manufacturer at Indianapolis, for installation at Boeing's assembly plant in Wichita. Each bulkhead weighs about 1380 pounds, it has a value of about $24,000.00, and extreme care must be exercised in its transportation. Because of the nature of the commodity, crating as required for rail transportation is impracticable. Each bulkhead is manufactured for use in a particular airplane, and ordinarily, a bulkhead can be used only in the plan for which it is manufactured.

Operating under its temporary authority, plaintiff has designed a specially constructed trailer, 35 feet long, 12½ feet high, and 8 feet wide. It utilizes this equipment in transporting the commodities for Boeing. It is possible to haul four bulkheads in one load, without special crating. Plaintiff's Wichita Terminal is located near the Boeing Plant, special equipment is assigned to the exclusive use of Boeing, and Boeing directs the movement of plaintiff's equipment which is available upon one hour's notice. The incoming bulkhead shipments are scheduled into Boeing's production line, for use on particular airplanes. Hence it is highly important that the bulkheads reach Boeing at a previously determined proper time to prevent disruption of production schedules. The bulkheads are unloaded directly into Boeing's production line. They are rigidly inspected by Boeing and the United States Air Force, and if there is material damage, they are returned to the [fol. 226] Indianapolis plant. Security safeguards must be taken, and plaintiff's drivers all have "security clearance."

Rail service was used at one time, but the cost of crating, loading and unloading was prohibitive. Furthermore, because of Boeing's need to correlate these incoming shipments with its production schedule, rail service was not feasible.

U.S.A.C. Transport, Inc., as a motor common carrier, holds authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling

by reason of size, weight or fragile character, between the points involved in this application. It has never performed this transportation service for Boeing. It has indicated, however, that it, too, will design and construct any special equipment needed for hauling this commodity, and that it, in all other ways, stands ready and willing to serve Boeing's needs. It has no terminal or other facilities at Wichita, Kansas, although it does have terminal facilities at Indianapolis.

Boeing has urged that only very specialized contract carriage can reasonably satisfy its transportation requirements. Although it has not sought to utilize U.S.A.C.'s service in this particular operation, it had experienced unsatisfactory service by U.S.A.C. on a prior occasion in 1953.

Initial hearing on plaintiff's application was completed in May, 1957. On July 18, 1957, the Examiner filed his report recommending that the application be granted, and that the permit for contract carrier operation be issued. After reviewing the evidence described above, the Examiner, upon finding that "a need has been shown for the proposed operation and * * * * a grant of such authority will not adversely affect present transportation facilities to any material extent * * * *," concluded that a grant of authority would be consistent with the public interest and the national transportation policy.

[fol. 227] On January 31, 1958, after exceptions were filed to the Examiner's recommendation, Division One of the Commission, Commissioners Hutchinson and McPherson participating, adopted the Examiner's findings as to facts, but ruled that inasmuch as plaintiff had failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy, the application would be denied. No mention whatever was made concerning tests prescribed by Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended August 22, 1957. The basis for the finding was expressed as follows:

> "The existing services of the opposing carriers which appeared to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to

be inadequate * * * * The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that *there is a need for the services proposed which existing carriers cannot or will not meet.*" (Emphasis supplied)

On July 25, 1958, the entire Commission denied petitions for reconsideration and oral argument. Subsequently, however, on October 16, 1958, the Commission reopened the proceeding for consideration, and the matter was held under advisement until June 15, 1959, when the decision of January 31, 1958, was reaffirmed.

In its second report, the Commission, in discussing the 1957 amendments to Sections 203(a)(15) and 209(b), observed that "the decisive factor" in ruling upon applications for contract carriage permits has always been whether "the available common carrier service was reasonably adequate" to "meet the reasonable transportation needs of those supporting the application", and that the 1957 amendments did not change this test. The Commission further concluded that, in determining the adverse effect upon protesting carriers, there is a presumption that an adverse effect will follow from a loss of *potential traffic*, even if it may not have been handled before. In further [fol. 228] observing that Congress did not intend the tests of Section 209(b) to be exclusive, the Commission concluded that since the good of the national transportation policy as a whole must be considered, common carriers should be given the opportunity "to make an effective showing of their *willingness and ability* to provide needed service."

In applying the "new test", the Commission conceded that plaintiff met the definition of a contract carrier, and that, as to the number of contracts to be served, plaintiff is a "bonafide" contract carrier. It also conceded that the type of service proposed was properly that of a contract carrier (although common carriers might perform the same type of service); it found that U.S.A.C. would be adversely affected by the grant; and it found that plaintiff would suffer no material adverse effects because its special equipment could be converted to other uses. As to the adverse effect upon Boeing, the Commission felt that this depended upon a

determination of whether "existing service is adequate to meet their transportation requirements", and concluded that "(U.S.A.C.'s) ability and willingness to provide the service which (Boeing) require(s), and the fact that, with respect to the instant traffic (Boeing) has (not) attempted to avail itself of U.S.A.C.'s services, (prohibited a finding) that existing service has been shown to be inadequate." Commissioners Freas and Walrath concurred in the result. Commissioner Webb, in concurring, felt that the report prescribed a sixth test not authorized by Congress, and, in fact, specifically deleted by Congress, i.e., requiring the applicant to show that the protesting common carriers "are unwilling or unable" to meet the shipper's transportation requirements. Commissioner McPherson, who participated in the first report, dissented, concluding that Boeing required a specialized service which was within the definition of contract carriage, and upon weighing the effect of a grant or denial he would decide in favor of a grant of authority in this case. Commissioners Mitchell, Arpaia, [fol. 229] and Winchell did not participate. Thus it appears that the report of June 15, 1959, represents the expressed views of four of the eleven Commissioners.

On August 22, 1957, significant changes were made in the Interstate Commerce Act in reference to contract carriers by motor vehicle. Our research indicates that this case is one of first impression in construing the provisions of the Act as amended. In testing the validity of the Commission's action here we are required to make analysis of the present statutory base under which the Commission acted. It therefore becomes necessary briefly to summarize the events giving rise to the 1957 amendments to the Act.

Before the amendment, Section 203(15) of the Act, 49 U.S.C.A., Section 303(15), defined "contract carrier" in the following terms:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation * * * * by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Under old Section 209(b), 49 U.S.C.A., Section 309(b), in ruling upon applications for contract carriage permits,

and apart from applicant's burden of showing that it was qualified generally as a contract carrier, the Commission was guided only by the requirement that the proposed service be "consistent with the public interest and the national transportation policy." In contrast, a *common carrier* was required to establish that its proposed operation was required "by the present or future public convenience and necessity." 49 U.S.C.A., Section 307(a).

In attempting to adjust the rights of contract and common carriers, the Commission found it necessary to expand and re-expand its interpretation of the Act. As a practical result, any difference in the standards and burden of proof on both types of applications became blurred, and sometimes interchangeable. Thus, in *William Heim Cartage Co., Inc., Ext.—Indianapolis*, 20 M.C.C. 329, 331, a *contract car-*
[fol. 230] *rier* application, the Commission spoke in terms of applicant's burden of showing "that facilities of existing carriers * * * * are inadequate, or that they are not rendering a type or character of service which satisfies the public need and convenience, and that the proposed service would tend to correct or substantially improve that condition."

In addition, the Commission began to read into Section 203(15) a "specialization test" as a prerequisite to a finding of bonafide contract carriage. However, common carriers began to amend their tariffs so as to offer "specialized service" with the ultimate result that contract carriers frequently were denied their claims of specialization. In attempting to resolve the perplexities of applying the "specialization test," the Commission turned to a consideration of the *number* of shippers served by contracts, as a factor negating specialization.

Generally, common carriers complained that contract carriers, by adding more and more contracts to their service, in effect became common carriers, to the detriment of that section of the industry. Conversely, the contract carriers found that as common carriers likewise began to offer specialized services, aided by the Commission's specialization test and attitude toward the standards and burden of proof on contract carrier applications, it became increasingly difficult to secure contract carriage permits.

Although some prior steps had been taken by the Com-

mission to secure legislation to "empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier * * * * may lawfully perform transportation services," and "to provide that motor contract carrier permits may be issued *only upon a showing that existing common carriers are unwilling or unable* to provide the type of service for which a need has been shown" (69th Annual Report of the Interstate Commerce Commission at page 132), the need for amendment [fol. 231] of the Act was brought to the fore by the decision of the Supreme Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956). There the Commission had directed the contract carrier to cease operations as a common carrier, basing its order in part, upon the fact that the carrier, by active solicitation, had secured sixty-nine contracts to serve shippers. In affirming the three-judge district court which had reversed the order, the Supreme Court disapproved the Commission's specialization test insofar as it sought to limit the number of shippers which a contract carrier could serve. Although not specifically ruling upon the use of the test as a whole, the Supreme Court found that "if specialization is to be read into 49 U.S.C., Section 303(a)(15) by the legislative history, it is satisfied here since appellee hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area." Ibid at 411.

Following this decision, the Commission caused bills to be introduced in Congress, H.R. 5123 in the House of Representatives, and S. 1384 in the Senate. These measures, identical in their provisions, would have amended Section 203(a)(15) to redefine contract carriage as follows:

> "The term 'contract carriage by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce for compensation * * * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*" (Emphasis added)

Section 209(b) was to be amended by providing that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

The inclusion of these clauses in the proposed amendments resulted in sharp opposition; and extensive hearings before the Senate Subcommittee are reported in a 358-page [fol. 232]volume entitled "Surface Transportation—Scope of Authority of ICC—Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, First Session." (No. 92433 U.S. Government Printing Office, Washington, 1957). During the hearings, the Commission proposed to delete the objectionable language in Section 209(b); i.e., "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," inasmuch as this would impose a "very difficult burden of proof" on applicants. After hearings, the House drafted an entirely new bill, and the Senate Committee released a drastically amended version of S. 1384. Although both bills were virtually identical, S. 1384 was finally enacted as Public Law 85-163.

Section 203(a)(15) of the Act, 49 U.S.C.A., 303(a)(15) as amended August 22, 1957, reads as follows:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Section 209(b) of the Act (49 U.S.C.A., 309(b)) as amended August 22, 1957, reads as follows:

> "Applications for such permits shall be made to the Commission in writing, be verified under oath, and

shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefore authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent author-
[fol. 233] ized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the services proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under Section 204(a)(2) and (6): Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any per-

> mit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in Section 203(a)(15), as in force on and after the effective date of this proviso." (Italics supplied, representing a portion of the new matter added to this section)

Thus while the Commission is still directed to issue a permit upon a finding that the proposed operation will be consistent with the public interest and the national transportation policy, in making this determination the Commission is now specifically required to consider and apply five statutory tests; namely, (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of protesting carriers, (4) the effect [fol. 234] which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirements.

With this legislative history in mind, we must determine whether the Commission acted within the scope of the statute in denying the application; and, if so, whether its findings are supported by substantial evidence, viewing the record as a whole.

Plaintiff urges that the effect of the Commission's decision is to apply the very standard first proposed in the amendments and subsequently withdrawn. With this contention we agree.

While the Commission apparently concedes that it no longer may deny a contract application upon the ground that applicant has failed to sustain the burden of proving that common carriers are "unwilling or unable" to perform the proposed service, it contends that in all instances under Section 209(b) it is proper to consider the "adequacy of existing services" in making a determination upon an application for new services. However, we are convinced that in determining whether a denial of the permit would

adversely affect the shipper in this instance, the Commission gave improper consideration to U.S.A.C.'s *willingness and ability* to perform, and that it further erred in conceiving its responsibility under Section 209(b). The Commission goes beyond the language and scope of the statute when it assumes and requires:

(a) That applicant carries the burden of showing that existing services are inadequate; and

(b) That the expressed "willingness and ability" of opposing carriers, together with absence of proof that such service has been tried and found wanting, ipso facto vitiates a contention that the service is "needed" by shipper, or that denial of the application will have an adverse effect upon shipper.

Subsequent decisions of the Commission in contract carriage proceedings demonstrate rather forcibly that the [fol. 235] Commission applied the "willing and able" test herein, and that it continues to pursue this course. In *Carolina Haulers, Inc., Contract Carrier Application*, No. MC-116825 (April 28, 1958) 76 M.C.C. 254, 256, we find the Commission stating:

> "*If sound economic conditions are to be maintained in the industry and a strong transportation system developed, existing available motor carriers*, before being deprived of desirable and needed traffic which they are able to handle efficiently, *must be shown to be unwilling or unable to meet the shipper's reasonable transportation needs.*" (Emphasis supplied)

In *Leo Holt, Jr., Extension—Pilings*, No. MC-85087 (July 14, 1958) 77 M.C.C. 141 at page 144, this language is noted:

> "Although both motor-carrier protestants are common carriers, there is no convincing evidence that applicant would provide any service to the supporting shipper which these protestants are *unable or unwilling* to provide * * * * We conclude that applicant has failed to sustain his burden of showing a need for the proposed service." (Emphasis supplied)

In *Wagner Contract Carrier Application*, No. MC-117010 (October 23, 1958), 77 M.C.C. 777, at page 781, it was stated:

> "We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle economically and efficiently, before a new competing service may be authorized therefor, unless it can show that such existing carriers are *unwilling or unable* to meet the public's reasonable transportation needs within the authorized territories." (Emphasis supplied)

In *Roy D. Yiengst Common Carrier Application*, No. MC-117308 (April 17, 1959), 79 M.C.C. 265 at page 268, the Commission, in denying the petitioner's application as a *common carrier* for a certificate of *public convenience and necessity*, used language almost identical to that just quoted in the *Wagner* contract carrier application:

> "We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle adequately and efficiently before a new competing service may be authorized therefor, in the absence, as here, of any showing that the existing carriers are unwilling or unable to provide needed service within the authorized territories."

In *E. L. Reddish Contract Carrier Application*, No. MC-117391 (June 30, 1959), 81 M.C.C. 35, at page 40, the Com-[fol. 236] mission, in citing its opinion here as authority for denial of the application, ruled upon applicant's contention that the willingness and ability of common carriers to provide the service should be given little weight by stating, "these issues were there (in the J-T case) resolved in a manner contrary to that urged by applicant; and it was found that the availability of common-carrier service is a relevant matter which must be considered in disposing of contract-carrier application."

As to the statements quoted in *Wagner* and *Yiengst*, supra, compare the 1939 statement of the Commission in

William Heim Cartage Company, Inc., Extension—Indianapolis, 20 M.C.C. 329, supra, at page 332:

> "The Commission has consistently stated that it is its belief that, in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation * * * *."

It is conceded that the purpose of the new legislation was to give the Commission more helpful standards than were contained in the present law. Certainly the burden of proving a contract carrier operation to be consistent with the public interest and the national transportation policy was not eliminated by the 1957 amendment.[1] The stand-

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[1] The National Transportation Policy, 49 U.S.C.A., note preceding Section 301, enacted September 18, 1940, provides as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the

ards of meeting this responsibility were changed, however, and as we read the statute these standards do not involve [fol. 237] a showing that common carriers are unwilling or unable to handle the traffic; or, stated otherwise, that common carrier service is inadequate. Under old Section 209(b), the only statutory requirement to qualify as a contract carrier was that the transportation be performed under individual contracts, and there was no limitation on the number of contracts. There was nothing to prevent a contract carrier, once it obtained a permit, from aggressively searching for new business within the limits of his permit, even though the authority may have been granted originally on the basis of the support of a single shipper.

The new sections sharply redefine contract carriage and give the Commission power to limit the number of contracts which a contract carrier can maintain. The Commission acquired the power to limit the service of the contract carrier to the shipper or shippers supporting the application. Congress set forth specific criteria to be considered, and deleted the test previously applied by the Commission involving a determination of adequacy of existing common carrier service.

[fol. 238] Defendants suggest that the specific criteria enumerated in the statute are not exclusive, but are only guides to be considered "among other things" in the context of the public interest and the national transportation policy. Of course the ultimate determination is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy. In making this determination, however, the Commission is directed specifically to consider five definite criteria. When the Commission injects a sixth criterion, specifically rejected by Congress, it clearly has erred.

The Commission by its orders found that plaintiff fulfilled the statutory requirements for a "contract carrier by motor vehicle" as prescribed by Section 203(a)(15). In applying the criteria prescribed by Congress in Section

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Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

209(b), the Commission correctly found that plaintiff met the requirements of the first and second tests, and, by implication, the fifth test. The decisive questions here involve the third and fourth criteria, requiring a consideration of the effect which granting the permit may have upon the services of protesting carriers, as well as the effect which denying the permit would have upon the applicant and its shipper.

Consideration of the effect on the services of protesting carriers does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting a permit would have on the existing services of that carrier. The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing common carrier service is adequate, the effect on existing protesting common carrier services is adverse. Thus, since the [fol. 239] Commission aids itself by a presumption, under this interpretation the "very difficult burden of proof" remains with the applicant and proposed shipper to negate the adverse effect on existing common carriers. The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.

The consideration of the effect on the services of protesting carriers is designed to afford a measure of protection for those carriers. This criterion does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting of a permit would have on the services of the carrier. If the protesting carrier was actually serving a shipper and participating in the traffic involved, the granting of a permit would divert traffic from the protesting carrier, and if this diversion would cause the services of the protesting carrier to be adversely affected to a material degree, this element certainly should be considered by the Commission. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no adverse effect on the services of the protesting carrier.

The fourth criterion involves a consideration of the effect which denying a permit would have on the applicant

and/or its shipper. This provision quite obviously was inserted in order to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. And to a notable degree, this provision emphasizes the new distinction required by Congress between a common carrier certificate of public convenience and necessity, and the contract carrier's permit.

[fol. 240] It is quite clear that the Commission has entirely misconceived the purport of the 1957 amendments, and its function and duty with regard to the criteria set out in Section 209(b). The Commission continues to cling to its old tests and reasoning, and Congress has decreed otherwise.

The statute now contemplates two forms of motor carrier service. And quite obviously and clearly, under the statute a contract carrier's permit cannot be limited and restricted to cases where no common carrier service is available. Now an element of shipper's service has been affirmatively recognized by Congress, and here it is quite clear that the proposed contract carrier service is designed to meet the distinct particular needs of Boeing and that in its operation it has met that need. Under the statute a shipper is entitled to have his distinct needs met. In carrying out this new philosophy of motor carrier service, Congress has clearly indicated that the Commission must recognize contract carrier service as a form of transportation applicable when the special needs of each service are considered, under the national transportation policy.

The new statute says that a permit *shall* be issued if it appears that the applicant is fit, willing and able to perform, and that the proposed operation will be consistent with the public interest and the national transportation policy. Note that this does not say that grounds for a certificate of public convenience and necessity must exist. Note further that the criteria set out in Section 209(b) are factors to be considered. The term "considered" may be defined in this connection as weighed or balanced. This does not mean necessarily, that because an applicant fails to meet affirmatively all five of the standards or tests prescribed by Congress, the Commission is warranted in [fol. 241] rejecting the application. It must be recognized

that Congress intended to and did by the contract carrier provisions of the statute establish a complementary system of motor transportation insofar as this was possible as a matter of consistency with the public interest and the national transportation policy declared in the Act.

Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, "The permit shall be issued, unless an existing carrier will be adversely affected." It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application.

We conclude that decisions turning solely on the "adequacy-willingness and ability" test cannot be justified and are clearly erroneous. There can be no doubt that this case was decided by the Commission on that basis. Nothing in the record before us warrants a denial of the application on any other grounds. Here a distinct need of an individual customer for specialized service and equipment was shown. A shipper desired it and asked for it, and within the scope of the revised definition of a contract carrier, the shipper's desires and the applicant's ability to meet them have achieved substantial pertinence.

Since the order denying the application must be vacated, we observe further that apart from the fact that a finding [fol. 242] of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application, there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question. Since U.S.A.C. is not participating in the traffic and never has been, the permit cannot possibly divert such traffic. There

is no evidence in the record that if the permit is denied, U.S.A.C. or any other existing carrier will ever be permitted to serve the needs of Boeing. And in this connection it should be noted that in reaching the conclusion that the shipper will suffer no adverse effect because U.S.A.C. is willing and able to perform, the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier. The Commission has neatly solved the problem with its finding that common carrier service is "adequate". Inasmuch as the "willing and able" test at times seems indistinguishable from, and in the eyes of the Commission, synonymous with, the "adequacy test", a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's "*reasonable transportation needs*", that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

We conclude that to the extent the Commission has ruled that the burden is on applicant to show the protesting common carriers are unable or unwilling to meet the shipper's [fol. 243] reasonable transportation requirements, the standard is not supported by the language of Section 209(b), whether it goes under the guise of an "adequacy test" or otherwise. It in effect injects into the Act the very qualifications and limitations suggested by the deleted portions of the amendment. The Commission may not rule that the proposed service fails to qualify as contract carriage under Section 203(a)(15) inasmuch as the service is, or may be "provided by common carriers." Neither may the Commission deny a permit under Section 209(b) because the applicant has failed to establish that existing common carriers are "unwilling or unable to provide the type of service for which a need has been shown."

We conclude generally that to the extent that the Com-

mission has attempted to apply substantially the same tests for determining public convenience and necessity as it relates to common carriage to the narrowly restricted language of the statute relating to consistency with the public interest as it applies to contract carriage, the action is not supported by the language of Section 209(b).

It is of interest to note that at one time the Commission recognized a difference in the standards of proof required to show consistency with the public interest incident to a contract carrier's permit, as compared to the certificate of public convenience and necessity required for a common carrier. Earlier, it was required that once a contract carrier applicant had established a prima facie case, there was some burden on the protestants to come forward with evidence in rebuttal. See *Jason W. House Contract Carrier Application*, 1 M.C.C. 725. At about the same time the Commission held that the availability of adequate common carrier service alone did not preclude the granting of a contract carrier authority. See *T. J. Broom Contract Carrier Application*, 1 M.C.C. 425; *Howard W. Juett Contract* [fol. 244] *Carrier Application*, 1 M.C.C. 268. Clearly the effect of the amended statute is to restore these procedures to a degree, and to give emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case. And it is clear that under the narrow definition of contract carriage found in the new law, there is no occasion, necessity or warrant for the same standards of proof in both applications.

The Commission cites many of its own rulings since the 1957 amendments under the well established theory that contemporaneous construction of a statute by those charged with its execution is entitled to great weight and should be affirmed unless clearly erroneous. However, the construction of a statute is a matter ultimately for the Courts to determine. Where the Commission's construction is clearly erroneous, the rule contended for does not apply. See *Woods* v. *Benson Hotel Corporation*, 177 F. 2d 543, (8th Cir. 1949); *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; *Mid-Continent Petroleum Corp.* v. *N.L.R.B.*, 204 F. 2d 613 (6th Cir. 1953), certiorari denied, 346 U.S. 856.

Plaintiff urges that we compel action by the Interstate Commerce Commission unlawfully withheld upon the appli-

cation of plaintiff, and requests that we direct the Interstate Commerce Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the Examiner. We have no such authority. Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner, or themselves to exercise administrative functions. See *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U.S. 32; *Work* v. *Rives*, 267 U.S. 175; *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17.

In the final analysis the Commission has the responsibility for determining what is best for the public interest and the national transportation policy, weighing the [fol. 245] various criteria that Congress has provided. The most that the courts may require is that all relevant factors be weighed carefully and fairly, and in this case, that no application be brushed aside upon the ground that an existing carrier wishes to perform the service. Again we emphasize that under the present statutory scheme, the shipper, the contract carrier and the common carrier all have coordinate interests; that there are now at least two forms of motor carrier service entitled to equal recognition, and that the interests of each must receive a fair consideration in reaching a determination which is consistent with the public interest and the policy of Congress with reference to national transportation.

For the foregoing reasons judgment will be entered setting aside the orders of the Interstate Commerce Commission and declaring them unlawful and void, and remanding the case to the Commission for further proceedings consistent with the rulings expressed here.

[fol. 246] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil Action No. 12497

J-T TRANSPORT COMPANY, INC., Plaintiff,

and

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants,

and

U.S.A.C. TRANSPORT, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, OF AMERICAN TRUCKING ASSOCIATIONS, INC., Intervening Defendants.

NOTICE OF APPEAL OF INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed October 6, 1960

I

Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled civil action, appeals to the Supreme Court of the United States from the final judgment entered in this action on August 9, 1960. This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II

The Clerk of the District Court will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 247] 1. Complaint of the plaintiff, filed August 21, 1959, with its Appendices "A", "B", "C", "D", and "E".

2. Order of Court of September 25, 1959, granting leave to the Contract Carrier Conference of American Trucking Associations, Inc., to intervene as a plaintiff.

3. Complaint of Contract Carrier Conference, intervening plaintiff, filed October 2, 1959, with its Appendices "A" and "B".

4. Order of Court of October 19, 1959, granting leave to U.S.A.C. Transport, Inc., to intervene as a defendant.

5. Answer by intervening defendant U.S.A.C. Transport, Inc., filed October 19, 1959, to complaint of the plaintiff.

6. Answer, filed October 20, 1959, by defendants United States of America and Interstate Commerce Commission to complaint of plaintiff.

7. Order of Court of October 21, 1959, for filing and exchange of opening and reply briefs.

8. Answer, filed November 3, 1959, by intervening defendant U.S.A.C. Transport, Inc., to complaint of intervening plaintiff Contract Carrier Conference.

9. Answer, filed November 10, 1959, by defendants United States of America and Interstate Commerce Commission, to complaint of intervening plaintiff Contract Carrier Conference.

10. Order of Court granting leave to Regular Common Carrier Conference of American Trucking Associations, Inc., to intervene as a defendant.

11. Answer, filed on or about November 10, 1959, by intervening defendant Regular Common Carrier Conference of American Trucking Associations, Inc., to complaint of the plaintiff.

12. Order of Court of November 23, 1959, extending times for filing and exchange of opening and reply briefs.

13. Order of Court granting leave to Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc., to intervene as a defendant.

[fol. 248] 14. Answer, filed on or about November 30, 1959, by intervening defendant Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc., to complaint of the plaintiff.

15. Order of Court granting leave to Aerospace Industries Association of America, Inc., to intervene as a plaintiff.

16. Complaint of intervening plaintiff Aerospace Indus-

tries Association of America, Inc., filed on or about December 9, 1959.

17. Answer, filed on or about December 14, 1959, by intervening defendant Regular Common Carrier Conference of American Trucking Associations, Inc., to complaint of intervening plaintiff Contract Carrier Conference of American Trucking Associations, Inc.

18. Answer, filed on or about December 21, 1959, by intervening defendant U.S.A.C. Transport, Inc., to complaint of intervening plaintiff Aerospace Industries Association of America, Inc.

19. Order of Court of December 29, 1959, extending time for parties to file and exchange reply briefs.

20. Answer, filed on or about January 15, 1960, by defendants United States of America and Interstate Commerce Commission, to complaint of intervening plaintiff Aerospace Industries Association of America, Inc.

21. Notice by the Court, dated January 29, 1960, of scheduled hearing before Division One of the Court on February 15, 1960.

22. Plaintiffs' Exhibit "A", received in evidence at hearing before the Court on February 15, 1960, being a certificate by the Secretary of the Interstate Commerce Commission, dated February 10, 1960, with respect to portions of the record before the Interstate Commerce Commission in Docket No. MC-11185 (Sub-No. 102), entitled J-T Transport Company Extension—Indianapolis, Inc., [fol. 249] and Docket No. MC-11185 (Sub-No. 100), entitled J-T Transport Company Extension—Columbus, Ohio, together with the portions of the record thus certified.

23. Opinion of the Court, filed August 9, 1960.

24. Judgment of the Court, filed August 9, 1960.

25. This notice of appeal.

III

The following questions are presented by this appeal:

1. Whether the District Court erred in holding that by the 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act Congress intended to require the Interstate Commerce Commission to grant a motor contract carrier permit without regard to the fact that existing

motor common carriers are able and willing to provide adequate service to the shipper.

2. Whether the District Court erred in holding that Section 209(b) of the Interstate Commerce Act, which requires the Commission to consider "the effect which granting the [contract carrier] permit would have upon the services of the protesting carriers," refers only to the diversion of traffic from a protesting carrier who is actually serving the shipper, and does not permit consideration of the loss of potential traffic by a protesting carrier who is able and willing to serve the shipper.

3. Whether the District Court erroneously concluded that the Interstate Commerce Commission, in denying an application for a motor contract carrier permit, had placed upon the applicant the burden of proving that the services of existing carriers are inadequate.

4. Whether the District Court erred in holding that the 1957 amendments to Section 209(b) made exclusive the five factors which the Commission was directed to consider, and [fol. 250] precluded its consideration of other factors, in determining whether a grant of a contract carrier permit would be consistent with the public interest and the national transportation policy.

/s/ Robert W. Ginnane, General Counsel. /s/ James Y. Piper, Assistant General Counsel Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

[fol. 250a] Proof of Service (omitted in Printing)

[fol. 251] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil Action No. 12497

J-T TRANSPORT COMPANY, INC., Plaintiff,

and

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants,

and

U.S.A.C. TRANSPORT, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, OF AMERICAN TRUCKING ASSOCIATIONS, INC., Intervening Defendants

NOTICE OF APPEAL OF U.S.A.C. TRANSPORT, INC., ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed October 7, 1960

I. Notice is hereby given that U.S.A.C. Transport, Inc., Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., intervening defendants in the above-entitled matter, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on August 9, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II. Intervening defendants adopt the request concurrently made by the Interstate Commerce Commission for preparation and transmission to the Clerk of the Supreme Court of the United States the transcript of record in this cause, embracing within the adoption each item designated by the Interstate Commerce Commission to be included, and, as well, this notice of appeal.

[fol. 252] III. The following questions are presented by this appeal:

1. Whether the Interstate Commerce Commission is now required by law to grant to a motor contract carrier applicant therefor a permit regardless of the existence of motor common carriers able and willing to provide the considered service.

2. Whether in interpreting Section 209(b) of the Interstate Commerce Act requiring the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers" the District Court erred in holding that the test relates only to diversion of traffic presently enjoyed in serving the affected shipper and excludes consideration of diverting potential traffic which the protesting carriers are willing and able to transport.

3. Whether the District Court erred in concluding that the Interstate Commerce Commission, in its denial of a permit to applicant, placed upon applicant the burden of proving inadequate the services of existing carriers.

4. Whether the District Court erred as a matter of law in limiting the factors which the Commission may consider in granting or denying a contract carrier application so that only the factors enumerated in the 1957 amendments to Section 209(b) are relevant.

Paul F. Sullivan, James K. Knudson, 1821 Jefferson Place, N. W., Washington 6, D. C.

Carll V. Kretsinger, 1014-1018 Temple Bldg., Kansas City, Missouri, Attorneys for U.S.A.C. Transport, Inc.

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Lee Reeder, 1012 Baltimore Building, Kansas City 5, Missouri, Attorneys for Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc.

John S. Fessenden, Roland Rice, 618 Perpetual Building, 1111 E Street, N. W., Washington 4, D. C.

[fol. 252a] John F. Edell, 6155 Oak Street, Kansas City 13, Missouri, Attorneys for Regular Common Carrier Conference of American Trucking Associations, Inc.

CERTIFICATE OF SERVICE (omitted in Printing)

[fol. 253] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 254] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

Nos. 563 and 564

INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.;

and

U.S.A.C. TRANSPORT, INC., ET AL., Appellants,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.

ORDER NOTING PROBABLE JURISDICTION—February 20, 1961

Appeals from the United States District Court for the Western District of Missouri.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

February 20, 1961

Mr. Justice Whittaker took no part in the consideration or decision of these cases.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 999078 1139

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Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 et seq:	
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J–T TRANSPORT COMPANY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI—WESTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri has been reported at 185 F. Supp. 838, and it is set forth in Appendix A to this Statement. The reports of the Interstate Commerce Commission are printed at 74 M.C.C. 324 (Report of Division 1) and 79 M.C.C. 695 (Report of the entire Commission).[1] They are repro-

[1] These reports both involved two motor carrier application proceedings before the Commission, namely, Docket No. MC–11185 (Sub-No. 100), entitled *J–T Transport Co., Inc., Extension—Columbus, Ohio*, and Docket No. MC–11185 (Sub-No. 102), entitled *J–T Transport Co., Inc., Extension—Indianapolis, Ind.* The Commission's orders in only the second, or the Sub 102 docket, are involved in the instant court proceedings.

duced as Appendices C and D, respectively, to this Statement.

JURISDICTION

The action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court (attached as Appendix B) was entered on August 9, 1960, and notice of appeal was filed in that court by the Commission on October 6, 1960.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133, and *American Trucking Associations, Inc., et al.* v. *United States et al.*, 364 U.S. 1.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix E.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that by the 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), Congress intended to require the Interstate Commerce Commission to grant a motor contract carrier permit without regard to the fact that existing motor common carriers are able and willing to provide adequate service to the shipper.

2. Whether the District Court erred in holding that Section 209(b) of the Interstate Commerce Act,

which requires the Commission to consider "the effect which granting the [contract carrier] permit would have upon the services of the protesting carriers," refers only to the diversion of traffic from a protesting carrier who is actually serving the shipper, and does not permit consideration of the loss of potential traffic by a protesting carrier who is able and willing to serve the shipper.

3. Whether the District Court erroneously concluded that the Interstate Commerce Commission, in denying an application for a motor contract carrier permit, had placed upon the applicant the burden of proving that the services of existing carriers are inadequate.

4. Whether the District Court erred in holding that the 1957 amendments to Section 209(b) made exclusive the five factors which the Commission was directed to consider, and precluded its consideration of other factors, in determining whether a grant of a contract carrier permit would be consistent with the public interest and the national transportation policy.

STATEMENT

Prior to the Commission hearing held in this case on May 22, 1957, there had been issued to the appellee J-T Transport Company, Inc., of Kansas City, Missouri, sixteen different permits [2] as a contract carrier

[2] Issued over the period from July 6, 1953, to January 17, 1957, in J-T's Dockets Nos. MC-11185, Sub-Nos. 37, 61, 64, 69, 72, 73, 76, 79, 80, 82, 84, 85, 91, 92, and 94 (Applicant's Exhibit No. 1 to the transcript of testimony, being part of Plaintiffs' Exhibit "A" received in evidence at the hearing on February 15, 1960, before the court below).

by motor vehicle under Section 209(b) of the Interstate Commerce Act, authorizing transportation by it of commodities described generally as uncrated aircraft components and assemblies, utilized by J–T for nine aircraft manufacturers, between various points in the United States, principally between certain points in Midwestern and Western States. By application filed on March 14, 1957, in J–T's Docket No. MC–11185 (Sub-No. 102), as amended on April 12, 1958, an extension-of-service permit was sought for operation as a contract carrier of "aircraft landing-gear bulkheads, uncrated, requiring special handling and special equipment because of their fragile nature," over irregular routes from Indianapolis, Ind., to Wichita, Kansas.

At the hearing held on this application, the Wichita Division of Boeing Airplane Company, consignee of the proposed traffic, supported the grant of the proposed permit. A manufacturer at Indianapolis, H & B American Machine Company, makes landing-gear bulkheads of outsize dimensions for Boeing, which the latter installs, upon delivery to it, in B–52 airplanes being manufactured at Wichita for the United States Air Force. Until the grant of temporary authority on February 8, 1957, to J–T, these bulkheads had been transported for about 20 months prior to that date from Indianapolis to Wichita by rail carriers, in returnable crates in flat cars.

U.S.A.C. Transport, Inc., of Detroit, Mich., one of the protestants against the grant of the application,

and which has also filed notice of appeal from the decision of the court below, is a motor common carrier which has held a certificate of public convenience and necessity from the Commission since January 18, 1950, in its Docket No. MC–108068 (Sub-No. 12) to transport, inter alia, "aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile nature," over irregular routes between points in the United States lying east of the Mississippi River and points lying west of that River, which authority would embrace the transportation from Indianapolis to Wichita proposed by appellee J–T. This protestant has served the aircraft industry almost exclusively since its predecessor-in-interest, U.S. Aeroplane Carriers, Inc., first obtained a certificate from the Commission in 1941. Among its 18 terminals throughout the country, U.S.A.C. maintains one at Indianapolis, the origin point of the shipments of bulkheads, where its equipment have not been fully utilized. It has in the past modified its equipment and has tailored its service to meet the specific transportation requirements of aircraft manufacturers, and it would meet Boeing's requirements, if it were offered the Indianapolis-Wichita traffic. Although Boeing knew of and had previously used the authorized common carrier services of U.S.A.C., it did not request that carrier to supply equipment for the Indianapolis-to-Wichita movement. U.S.A.C. brought these facts out upon the record at the Commission's hearing.

The hearing examiner on July 16, 1957, recommended a grant of J–T's Sub 102 application (Complaint, Appendix "A", page 3). Following exceptions filed to that recommended report, and a reply, the Commission's Division 1, on January 31, 1958, issued its report (74 M.C.C. 324, being Appendix C, *infra*, pp. 27a–33a) and order disapproving the examiner's recommendations and denying the Sub 102 application.[3] Reconsideration and oral argument were denied by order of July 25, 1958, by the entire Commission (Complaint, Appendix "C"). Upon J–T's second petition for reconsideration filed on September 2, 1958, the entire Commission by order of October 16, 1958 (Complaint, Appendix "E") reopened the Sub 102 proceeding for reconsideration and for the issuance of a further report and order of the Commission.

On June 15, 1959, the Commission issued its report on reconsideration (79 M.C.C. 695, being Appendix D, *infra*, pp. 34a–62a) and order,[4] again denying the Sub 102 application.

On August 21, 1959, J-T instituted an action in the District Court to set aside the reports and orders of Division 1 and of the Commission entered on January 31, 1958, and June 15, 1959, respectively, denying the Sub 102 application.

On August 9, 1960, the District Court rendered its opinion (Appendix A, *infra*, pp. 1a–25a, 185 F. Supp. 838) and judgment (Appendix B, *infra*, p.

[3] Complaint, Appendix "B", page 6.

[4] Complaint, Appendix "D", page 31.

26a), setting aside the Commission's orders as being unlawful and void, and remanding the cause to the Commission for further proceedings consistent with such opinion.

THE QUESTIONS ARE SUBSTANTIAL

This case presents the broad and important question of whether the Congress, in the 1957 amendments to the motor contract carrier provisions of the Interstate Commerce Act, has required the Interstate Commerce Commission to issue a contract carrier permit whenever a shipper shows a need for specialized service, without regard to the fact that existing motor common carrier services are adequate. The resolution of this issue will determine whether a very substantial volume of traffic is almost automatically allocated to motor contract carriage, with a corresponding erosion of the traffic potentially available to motor common carriers.

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Act were the aftermath to this Court's decision in *United States* v. *Contract Steel Carriers,* 350 U.S. 409, 412 (1956), that "a contract carrier is free to aggressively search for new business within the limits of its license." Thus, Congress redefined the term "contract carrier by motor vehicle" in Section 203(a)(15) as "any person which engages in transportation by motor vehicle * * * under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of trans-

portation services designed to meet the distinct need of each individual customer." At the same time, Section 209(b) was amended to empower the Commission to limit the number of persons which can be served by a contract carrier so as to assure that its business remains contract carriage.

Prior to the 1957 amendments, Section 209(b) authorized motor contract carrier operations found by the Commission to be "consistent with the public interest and the national transportation policy." The 1957 amendments also added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

This case arises out of the quoted amendment, and out of the history of the 1957 amendment to Section 203 (a)(15).

In the instant case, J-T Transport Co., Inc., sought authority to provide for Boeing Airplane Company a specialized service in the transportation of aircraft landing gear bulkheads from Indianapolis to Wichita which the Commission found to be within the new definition of contract carriage in Section 203(a)(15).

The application was opposed by U.S.A.C. Transport, Inc., a common carrier authorized to transport aircraft parts and equipment, crated or uncrated, between Indianapolis and Wichita. U.S.A.C., while a common carrier, specializes in the transportation of aircraft parts and engines (App. D, *infra*, p. 38a). The Commission denied J-T's application, concluding "(1) that the character of the shippers' transportation requirements is not such as to preclude their performance by a common carrier, (2) that U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application, (3) that in view of the adequacy of existing common-carrier service the supporting shippers would not be materially affected by a denial of the applications, (4) that the potential loss of traffic to U.S.A.C. outweighs any detriment to applicant, (5) that to authorize the proposed operations will not be consistent with the public interest and the national transportation policy, * * *" (App. D, *infra*, pp. 59a–60a). In so holding, the Commission stated that in considering the effect of issuing a permit upon the services of protesting carriers "There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of 'potential' traffic, even if they may not have handled it before," i.e., "that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized" * * * (App. D, *infra*, p. 50a).

1. The court below clearly erred in holding that the Commission had improperly placed upon the applicant (J-T) the burden of showing that existing com-

mon carriers were unable or unwilling to meet the shipper's needs. We submit that the Commission did not place such a burden of proof upon the applicant. Rather, since it affirmatively appeared that U.S.A.C. was already authorized to serve the points involved, was already performing a highly specialized service in transporting aircraft parts, and was able and willing to serve the shipper, and where the shipper had not availed itself of U.S.A.C.'s services, the Commission stated that "we cannot find that existing service has been shown to be inadequate" (App. D, *infra*, pp. 56a–57a). Under these circumstances, the lower court's conclusion as to burden of proof can only mean that the Commission may not take into consideration affirmative evidence that an existing carrier is authorized, able and willing to meet the shipper's needs.

2. The court below arrived at the same result by holding that the provision in Section 209(b) that the Commission shall consider "the effect which granting the [contract carrier] permit would have upon the services of protesting carriers," refers only to the diversion of traffic from a protesting carrier who is already serving the shipper, and does not permit consideration of the loss of potential traffic by existing carriers who are not presently serving the shipper but are able and willing to do so. In thus rejecting the Commission's position (long ante-dating 1957) that the loss of potential traffic by existing carriers is a significant factor to be considered, the court below recognized, at least by implication, that this was a factor properly considered by the Commission in de-

termining applications for motor common carrier certificates of public convenience and necessity. However, the court held that the 1957 amendments "give emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case", and prohibit consideration of this factor in determining contract carrier applications. To the contrary, we think it clear that Section 209(b) in requiring the Commission to consider both the effect of the grant of a permit upon the services of protesting carriers and the effect of a denial upon the applicant, cannot be read as requiring consideration of the potential loss of traffic to the applicant and prohibiting consideration of the potential loss of traffic to existing carriers.

3. More broadly, referring to the 1957 amendments, the court below declared that "The statute now contemplates two forms of motor carrier service. * * * In carrying out this new philosophy of motor carrier service, Congress has clearly indicated that the Commission must recognize contract carrier service as a form of transportation applicable when the special needs of each service are considered, under the national transportation policy" (App. A, *infra*, pp. 19a–20a). And again, "we emphasize that under the present statutory scheme, the shipper, the contract carrier and the common carrier all have coordinate interests; that there are now at least two forms of motor carrier service entitled to equal recognition, * * *" (App. A, *infra*, p. 25a). Clearly, the court below was of the view that the 1957 amendments, which originated in the Congressional belief that this Court's *Contract*

Steel Carriers decision gave too broad a scope to motor contract carriage, have in yet another way greatly enhanced the role of contract carriage at the expense of common carrier transportation. Not a word in the legislative history of the 1957 amendments reflects any Congressional understanding that this was their purpose.

The decision finds such a drastic change in national transportation policy by two deductions, both of which we believe to be erroneous. First, the Commission had proposed an amendment to Section 209(b) that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." As the court below noted, during the 1957 hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., entitled *Surface Transportation-Scope of Authority of I.C.C.* (p. 22), the Commission proposed deletion of its own proposal "because of the very difficult burden of proof that would be imposed on applicants." We submit that sparing contract carrier applicants from the burden of proving that existing common carriers are unwilling or unable to provide a needed service, does not reflect a Congressional purpose that contract carrier permits shall be issued without regard to the potential effect upon existing common carrier transportation.

Secondly, the court below held that the five factors set forth in Section 209(b) to be considered by the Commission in determining whether a proposed con-

tract carrier operation would be consistent with the public interest and the national transportation policy, are exclusive and preclude the Commission from considering the adequacy of existing common carrier service (App. A, *infra*, p. 17a). We submit that the adequacy of existing motor carrier services is obviously pertinent in determining the effect of a denial upon the shipper—one of the factors which the Commission admittedly must consider. Again, nothing in the legislative history suggests that Congress even contemplated such a drastic change in the relative roles of motor contract and motor common carriage.[8]

4. The practical importance of this case arises from the fact, discussed in the Commission's report (App. D, *infra*, pp. 42a–43a), that many motor common carriers (such as U.S.A.C.) are engaged in performing transportation services which are as specialized as those of contract carriers. For example, both motor common and motor contract carriers engage exten-

[8] To the contrary, the General Counsel for the Contract Carrier Conference of American Trucking Associations, Inc., the author of the enumerated factors which were inserted in Section 209(b), told the Senate subcommittee (Senate Hearings, *supra*, p. 300): "* * * that the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration. * * *" There was no suggestion that the amendment would prohibit the Commission from continuing to consider the adequacy of existing common carrier services to meet the shipper's need.

sively in the transportation of automobiles and trucks in special vehicles. See *American Trucking Ass'ns* v. *United States*, 364 U.S. 1. More broadly, under present concepts of marketing and distribution, motor common carrier transportation is increasingly tailored, in such respects as equipment and schedules, to meet shipper needs. At the same time, however, the common carrier remains under obligation to provide all shippers within the scope of its authority with reasonable service at reasonable and non-discriminatory rates, while the contract carrier is free to select his customers and to charge varying rates for the same service. The maintenance of a healthy system of common carrier transportation has been a basic objective of Federal transportation policy. A substantial diversion of traffic to contract carriage could, as the Chairman of the Commission testified before the Senate Subcommittee in 1957 (Hearings, *supra*, p. 22) "seriously impair [the ability of common carriers] to render adequate service to the general public, particularly to the small shippers who depend almost entirely upon common carrier transportation, and seldom have enough business to justify entering into a contract with a contract carrier."* We submit that whether Congress intended to make a significant change in the relative roles of motor common and contract carriage should be determined by this Court.

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*The Senate Committee on Interstate and Foreign Commerce, in reporting the 1957 amendments, emphasized "the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, * * *." Sen. Rep. 703, 85th Cong., 1st Sess., p. 7.

The immediate importance of these questions is shown by the facts that a three-judge court in the Western District of Arkansas has already rendered a similar decision in *Reddish* v. *United States et al.*, Civil Action No. 1531, decided October 19, 1960; the Commission had decided, after the 1957 amendments, 16 contract carrier application cases prior to and inconsistently with the decision below; and there are pending before the Commission for decision at least 42 additional contract carrier application cases which involve the same issues as the instant case.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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Washington 25, D.C.

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APPENDIX A

In the United States District Court for the Western District of Missouri, Western Division

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No. 12497

J-T TRANSPORT COMPANY, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before JOHNSEN and MATTHES, *Circuit Judges,* and SMITH, *District Judge*

R. JASPER SMITH, *District Judge:*

This is an action brought under Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of Title 28 United States Code, to enjoin, set aside and annul orders of the Interstate Commerce Commission dated January 31, 1958, and June 15, 1959, and to compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff in a proceeding under Section 205(g) of the Interstate Commerce Act (49 U.S.C.A. 305(g)), to grant to plaintiff a permit as a contract carrier of certain property by motor vehicle from Indianapolis, Indiana, to Wichita, Kansas. By leave of Court Contract Carrier Conference of American Trucking Associations, Inc. and Aerospace Industries Association of America, Inc., as

Intervening Plaintiffs, and U.S.A.C. Transport, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., and Common Carrier Conference—Irregular Route—of American Trucking Association, Inc., as Intervening Defendants, were allowed to intervene and file briefs.

Since 1953, plaintiff has held certain irregular route permits from the Commission as a contract carrier of property by motor vehicle. On March 14, 1957, it filed its application for an additional irregular route permit to authorize an extension of its operations in transporting aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis to Wichita. The application is supported by Boeing Aircraft Company, which operates a plant at Wichita for the production of airplanes.

The specific commodities to be transported are "landing gear bulkheads". They are purchased by Boeing from a manufacturer at Indianapolis, for installation at Boeing's assembly plant in Wichita. Each bulkhead weighs about 1,380 pounds, it has a value of about $24,000.00, and extreme care must be exercised in its transportation. Because of the nature of the commodity, crating as required for rail transportation is impracticable. Each bulkhead is manufactured for use in a particular airplane, and ordinarily, a bulkhead can be used only in the plane for which it is manufactured.

Operating under its temporary authority, plaintiff has designed a specially constructed trailer, 35 feet long, 12½ feet high, and 8 feet wide. It utilizes this equipment in transporting the commodities for Boeing. It is possible to haul four bulkheads in one load, without special crating. Plaintiff's Wichita Terminal is located near the Boeing Plant, special equip-

ment is assigned to the exclusive use of Boeing, and Boeing directs the movement of plaintiff's equipment which is available upon one hour's notice. The incoming bulkhead shipments are scheduled into Boeing's production line, for use on particular airplanes. Hence it is highly important that the bulkheads reach Boeing at a previously determined proper time to prevent disruption of production schedules. The bulkheads are unloaded directly into Boeing's production line. They are rigidly inspected by Boeing and the United States Air Force, and if there is material damage, they are returned to the Indianapolis plant. Security safeguards must be taken, and plaintiff's drivers all have "security clearance."

Rail service was used at one time, but the cost of crating, loading and unloading was prohibitive. Furthermore, because of Boeing's need to correlate these incoming shipments with its production schedule, rail service was not feasible.

U.S.A.C. Transport, Inc., as a motor common carrier, holds authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character, between the points involved in this application. It has never performed this transportation service for Boeing. It has indicated, however, that it, too, will design and construct any special equipment needed for hauling this commodity, and that it, in all other ways, stands ready and willing to serve Boeing's needs. It has no terminal or other facilities at Wichita, Kansas, although it does have terminal facilities at Indianapolis.

Boeing has urged that only very specialized contract carriage can reasonably satisfy its transportation requirements. Although it has not sought to

utilize U.S.A.C.'s service in this particular operation, it had experienced unsatisfactory service by U.S.A.C. on a prior occasion in 1953.

Initial hearing on plaintiff's application was completed in May, 1957. On July 18, 1957, the Examiner filed his report recommending that the application be granted, and that the permit for contract carrier operation be issued. After reviewing the evidence described above, the Examiner, upon finding that "a need has been shown for the proposed operation and * * * a grant of such authority will not adversely affect present transportation facilities to any material extent * * *," concluded that a grant of authority would be consistent with the public interest and the national transportation policy.

On January 31, 1958, after exceptions were filed to the Examiner's recommendation, Division One of the Commission, Commissioners Hutchinson and McPherson participating, adopted the Examiner's findings as to facts, but ruled that inasmuch as plaintiff had failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy, the application would be denied. No mention whatever was made concerning tests prescribed by Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended August 22, 1957. The basis for the finding was expressed as follows:

> The existing services of the opposing carriers which appeared to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to be inadequate. * * * The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that *there is a need for the serv-*

ices proposed which existing carriers cannot or will not meet. [Emphasis supplied.]

On July 25, 1958, the entire Commission denied petitions for reconsideration and oral argument. Subsequently, however, on October 16, 1958, the Commission reopened the proceeding for consideration, and the matter was held under advisement until June 15, 1959, when the decision of January 31, 1958, was reaffirmed.

In its second report, the Commission, in discussing the 1957 amendments to Sections 203(a)(15) and 209(b), observed that "the decisive factor" in ruling upon applications for contract carriage permits has always been whether "the available common carrier service was reasonably adequate" to "meet the reasonable transportation needs of those supporting the application", and that the 1957 amendments did not change this test. The Commission further concluded that, in determining the adverse effect upon protesting carriers, there is a presumption that an adverse effect will follow from a loss of *potential traffic,* even if it may not have been handled before. In further observing that Congress did not intend the tests of Section 209(b) to be exclusive, the Commission concluded that since the good of the national transportation policy as a whole must be considered, common carriers should be given the opportunity "to make an effective showing of their *willingness and ability* to provide needed service."

In applying the "new test", the Commission conceded that plaintiff met the definition of a contract carrier, and that, as to the number of contracts to be served, plaintiff is a "bona fide" contract carrier. It also conceded that the type of service proposed was properly that of a contract carrier (although common carriers might perform the same type of serv-

ice); it found that U.S.A.C. would be adversely affected by the grant; and it found that plaintiff would suffer no material adverse effects because its special equipment could be converted to other uses. As to the adverse effect upon Boeing, the Commission felt that this depended upon a determination of whether "existing service is adequate to meet their transportation requirements", and concluded that "(U.S.A.C.'s) ability and willingness to provide the service which (Boeing) require(s), and the fact that, with respect to the instant traffic (Boeing) has (not) attempted to avail itself of U.S.A.C.'s services, (prohibited a finding) that existing service has been shown to be inadequate." Commissioners Freas and Walrath concurred in the result. Commissioner Webb, in concurring, felt that the report prescribed a sixth test not authorized by Congress, and, in fact, specifically deleted by Congress, i.e., requiring the applicant to show that the protesting common carriers "are unwilling or unable" to meet the shipper's transportation requirements. Commissioner McPherson, who participated in the first report, dissented, concluding that Boeing required a specialized service which was within the definition of contract carriage, and upon weighing the effect of a grant or denial he would decide in favor of a grant of authority in this case. Commissioners Mitchell, Arpaia, and Winchell did not participate. Thus it appears that the report of June 15, 1959, represents the expressed views of four of the eleven Commissioners.

On August 22, 1957, significant changes were made in the Interstate Commerce Act in reference to contract carriers by motor vehicle. Our research indicates that this case is one of first impression in construing the provisions of the Act as amended. In testing the validity of the Commission's action here

we are required to make analysis of the present statutory base under which the Commission acted. It therefore becomes necessary briefly to summarize the events giving rise to the 1957 amendments to the Act.

Before the amendment, Section 203(a)(15) of the Act, 49 U.S.C.A., Section 303(a)(15), defined "contract carrier" in the following terms:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation * * * by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

Under old Section 209(b), 49 U.S.C.A. Section 309(b), in ruling upon applications for contract carriage permits, and apart from applicant's burden of showing that it was qualified generally as a contract carrier, the Commission was guided only by the requirement that the proposed service be "consistent with the public interest and the national transportation policy." In contrast, a *common carrier* was required to establish that its proposed operation was required "by the present or future public convenience and necessity." 49 U.S.C.A. Section 307(a).

In attempting to adjust the rights of contract and common carriers, the Commission found it necessary to expand and re-expand its interpretation of the Act. As a practical result, any difference in the standards and burden of proof on both types of applications became blurred, and sometimes interchangeable. Thus, in *William Heim Cartage Co., Inc., Ext.—Indianapolis,* 20 M.C.C. 329, 331, a *contract carrier* application, the Commission spoke in terms of applicant's burden of showing "that facilities of existing carriers * * * are inadequate, or that they they are not rendering a type or character of service

which satisfies the public need and convenience, and that the proposed service would tend to correct or substantially improve that condition."

In addition, the Commission began to read into Section 203(a)(15) a "specialization test" as a prerequisite to a finding of bona fide contract carriage. However, common carriers began to amend their tariffs so as to offer "specialized service" with the ultimate result that contract carriers frequently were denied their claims of specialization. In attempting to resolve the perplexities of applying the "specialization test," the Commission turned to a consideration of the *number* of shippers served by contracts, as a factor negating specialization.

Generally, common carriers complained that contract carriers, by adding more and more contracts to their service, in effect became common carriers, to the detriment of that section of the industry. Conversely, the contract carriers found that as common carriers likewise began to offer specialized services, aided by the Commission's specialization test and attitude toward the standards and burden of proof on contract carrier applications, it became increasingly difficult to secure contract carriage permits.

Although some prior steps had been taken by the Commission to secure legislation to "empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier * * * may lawfully perform transportation services," and "to provide that motor contract carrier permits may be issued *only upon a showing that existing common carriers are unwilling or unable* to provide the type of service for which a need has been shown" (69th Annual Report of the Interstate Commerce Commission at page 132), the need for amendment of the Act was brought to the fore by the

decision of the Supreme Court in *United States* v. *Contract Steel Carriers,* 1956, 350 U.S. 409, 76 S. Ct. 461, 100 L. Ed. 482. There the Commission had directed the contract carrier to cease operations as a common carrier, basing its order in part, upon the fact that the carrier, by active solicitation, had secured sixty-nine contracts to serve shippers. In affirming the three-judge district court which had reversed the order, the Supreme Court disapproved the Commission's specialization test insofar as it sought to limit the number of shippers which a contract carrier could serve. Although not specifically ruling upon the use of the test as a whole, the Supreme Court found that "if specialization is to be read into 49 U.S.C. Section 303(a)(15), 49 U.S.C.A. § 303(a)(15) by the legislative history, it is satisfied here since appellee hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area." Ibid., 350 U.S. at page 411, 76 S. Ct. at page 463.

Following this decision, the Commission caused bills to be introduced in Congress, H.R. 5123 in the House of Representatives, and S. 1384 in the Senate. These measures, identical in their provisions, would have amended Section 203(a)(15) to redefine contract carriage as follows:

> The term "contract carriage by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce for compensation * * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.* [Emphasis added.]

Section 209(b) was to be amended by providing that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

The inclusion of these clauses in the proposed amendments resulted in sharp opposition; and extensive hearings before the Senate Subcommittee are reported in a 358-page volume entitled "Surface Transportation—Scope of Authority of ICC—Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, First Session." (No. 92433 U.S. Government Printing Office, Washington, 1957). During the hearings, the Commission proposed to delete the objectionable language in Section 209(b); i.e., "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," inasmuch as this would impose a "very difficult burden of proof" on applicants. After hearings, the House drafted an entirely new bill, and the Senate Committee released a drastically amended version of S. 1384. Although both bills were virtually identical, S. 1384 was finally enacted as Public Law 85–163.

Section 203(a)(15) of the Act, 49 U.S.C.A., 303 (a)(15) as amended August 22, 1957, reads as follows:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) * * * and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation

services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Act (49 U.S.C.A. § 309(b)) as amended August 22, 1957, reads as follows:

> Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the

> contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under Section 204(a) (2) and (6): Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in Section 203(a)(15), as in force on and after the effective date of this proviso. [Italics supplied, representing a portion of the new matter added to this section.]

Thus while the Commission is still directed to issue a permit upon a finding that the proposed operation will be consistent with the public interest and the national transportation policy, in making this determination the Commission is now specifically required to

consider and apply five statutory tests; namely, (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirements.

With this legislative history in mind, we must determine whether the Commission acted within the scope of the statute in denying the application; and, if so, whether its findings are supported by substantial evidence, viewing the record as a whole.

Plaintiff urges that the effect of the Commission's decision is to apply the very standard first proposed in the amendments and subsequently withdrawn. With this contention we agree.

While the Commission apparently concedes that it no longer may deny a contract application upon the ground that applicant has failed to sustain the burden of proving that common carriers are "unwilling or unable" to perform the proposed service, it contends that in all instances under Section 209(b) it is proper to consider the "adequacy of existing services" in making a determination upon an application for new services. However, we are convinced that in determining whether a denial of the permit would adversely affect the shipper in this instance, the Commission gave improper consideration to U.S.A.C.'s *willingness and ability* to perform, and that it further erred in conceiving its responsibility under Section 209(b). The Commission goes beyond the language and scope of the statute when it assumes and requires:

(a) That applicant carries the burden of showing that existing services are inadequate; and

(b) That the expressed "willingness and ability" of opposing carriers, together with absence of proof that such service has been tried and found wanting, ipso facto vitiates a contention that the service is "needed" by shipper, or that denial of the application will have an adverse effect upon shipper.

Subsequent decisions of the Commission in contract carriage proceedings demonstrate rather forcibly that the Commission applied the "willing and able" test herein, and that it continues to pursue this course. In *Carolina Haulers, Inc., Contract Carrier Application*, No. MC–116825 (April 28, 1958) 76 M.C.C. 254, 256, we find the Commission stating:

> *If sound economic conditions are to be maintained in the industry and a strong transportation system developed, existing available motor carriers,* before being deprived of desirable and needed traffic which they are able to handle efficiently, *must be shown to be unwilling or unable to meet the shipper's reasonable transportation needs.* [Emphasis supplied.]

In *Leo Holt, Jr., Extension—Pilings*, No. MC–85087 (July 14, 1958) 77 M.C.C. 141 at page 144, this language is noted:

> Although both motor-carrier protestants are common carriers, there is no convincing evidence that applicant would provide any service to the supporting shipper which these protestants are *unable or unwilling* to provide * * * We conclude that applicant has failed to sustain his burden of showing a need for the proposed service. [Emphasis supplied.]

In *Wagner Contract Carrier Application*, No. MC–117010 (October 23, 1958), 77 M.C.C. 777, at page 781, it was stated:

> We have held repeatedly that the existing motor carriers are entitled to all authorized

> traffic that they can handle economically and efficiently, before a new competing service may be authorized therefor, unless it can show that such existing carriers are *unwilling or unable* to meet the public's reasonable transportation needs within the authorized territories. [Emphasis supplied.]

In *Roy D. Yiengst Common Carrier Application*, No. MC–117308 (April 17, 1959), 79 M.C.C. 265 at page 268, the Commission, in denying the petitioner's application as a *common carrier* for a certificate of *public convenience and necessity*, used language almost identical to that just quoted in the *Wagner* contract carrier application:

> We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle adequately and efficiently before a new competing service may be authorized therefor, in the absence, as here, of any showing that the existing carriers are unwilling or unable to provide needed service within the authorized territories.

In *E. L. Reddish Contract Carrier Application*, No. MC–117391 (June 30, 1959), 81 M.C.C. 35, at page 40, the Commission, in citing its opinion here as authority for denial of the application, ruled upon applicant's contention that the willingness and ability of common carriers to provide the service should be given little weight by stating, "these issues were there (in the J–T case) resolved in a manner contrary to that urged by applicant; and it was found that the availability of common-carrier service is a relevant matter which must be considered in disposing of contract-carrier application."

As to the statements quoted in *Wagner* and *Yiengst, supra*, compare the 1939 statement of the Commission

in *William Heim Cartage Company, Inc., Extension—Indianapolis,* 20 M.C.C. 329, *supra,* at page 332:

> The Commission has consistently stated that it is its belief that, in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation * * *.

It is conceded that the purpose of the new legislation was to give the Commission more helpful standards than were contained in the present law. Certainly the burden of proving a contract carrier operation to be consistent with the public interest and the national transportation policy was not eliminated by the 1957 amendment.[1] The standards of meeting

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[1] The National Transportation Policy, 49 U.S.C.A. note preceding Section 301, enacted September 18, 1940, provides as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

this responsibility were changed, however, and as we read the statute these standards do not involve a showing that common carriers are unwilling or unable to handle the traffic; or, stated otherwise, that common carrier service is inadequate. Under old Section 209(b), the only statutory requirement to qualify as a contract carrier was that the transportation be performed under individual contracts, and there was no limitation on the number of contracts. There was nothing to prevent a contract carrier, once it obtained a permit, from aggressively searching for new business within the limits of his permit, even though the authority may have been granted originally on the basis of the support of a single shipper.

The new sections sharply redefine contract carriage and give the Commission power to limit the number of contracts which a contract carrier can maintain. The Commission acquired the power to limit the service of the contract carrier to the shipper or shippers supporting the application. Congress set forth specific criteria to be considered, and deleted the test previously applied by the Commission involving a determination of adequacy of existing common carrier service.

Defendants suggest that the specific criteria enumerated in the statute are not exclusive, but are only guides to be considered "among other things" in the context of the public interest and the national transportation policy. Of course the ultimate determination is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy. In making this determination, however, the Commission is directed specifically to consider five definite criteria. When the Commission injects a sixth criterion, specifically rejected by Congress, it clearly has erred.

The Commission by its orders found that plaintiff fulfilled the statutory requirements for a "contract carrier by motor vehicle" as prescribed by Section 203(a)(15). In applying the criteria prescribed by Congress in Section 209(b), the Commission correctly found that plaintiff met the requirements of the first and second tests, and, by implication, the fifth test. The decisive questions here involve the third and fourth criteria, requiring a consideration of the effect which granting the permit may have upon the services of protesting carriers, as well as the effect which denying the permit would have upon the applicant and its shipper.

Consideration of the effect on the services of protesting carriers does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting a permit would have on the existing services of that carrier. The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing common carrier service is adequate, the effect on existing protesting common carrier services is adverse. Thus, since the Commission aids itself by a presumption, under this interpretation the "very difficult burden of proof" remains with the applicant and proposed shipper to negate the adverse effect on existing common carriers. The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.

The consideration of the effect on the services of protesting carriers is designed to afford a measure of protection for those carriers. This criterion does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather

what effect, if any, granting of a permit would have on the services of the carrier. If the protesting carrier was actually serving a shipper and participating in the traffic involved, the granting of a permit would divert traffic from the protesting carrier, and if this diversion would cause the services of the protesting carrier to be adversely affected to a material degree, this element certainly should be considered by the Commission. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no adverse effect on the services of the protesting carrier.

The fourth criterion involves a consideration of the effect which denying a permit would have on the applicant and/or its shipper. This provision quite obviously was inserted in order to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. And to a notable degree, this provision emphasizes the new distinction required by Congress between a common carrier certificate of public convenience and necessity, and the contract carrier's permit.

It is quite clear that the Commission has entirely misconceived the purport of the 1957 amendments, and its function and duty with regard to the criteria set out in Section 209(b). The Commission continues to cling to its old tests and reasoning, and Congress has decreed otherwise.

The statute now contemplates two forms of motor carrier service. And quite obviously and clearly, under the statute a contract carrier's permit cannot be limited and restricted to cases where no common carrier service is available. Now an element of shipper's service has been affirmatively recognized by

Congress, and here it is quite clear that the proposed contract carrier service is designed to meet the distinct particular needs of Boeing and that in its operation it has met that need. Under the statute a shipper is entitled to have his distinct needs met. In carrying out this new philosophy of motor carrier service, Congress has clearly indicated that the Commission must recognize contract carrier service as a form of transportation applicable when the special needs of each service are considered, under the national transportation policy.

The new statute says that a permit *shall* be issued if it appears that the applicant is fit, willing and able to perform, and that the proposed operation will be consistent with the public interest and the national transportation policy. Note that this does not say that grounds for a certificate of public convenience and necessity must exist. Note further that the criteria set out in Section 209(b) are factors to be considered. The term "considered" may be defined in this connection as weighed or balanced. This does not mean necessarily, that because an applicant fails to meet affirmatively all five of the standards or tests prescribed by Congress, the Commission is warranted in rejecting the application. It must be recognized that Congress intended to and did by the contract carrier provisions of the statute establish a complementary system of motor transportation insofar as this was possible as a matter of consistency with the public interest and the national transportation policy declared in the Act.

Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial

of the permit. The statute does not say, "The permit shall be issued, unless an existing carrier will be adversely affected." It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application.

We conclude that decisions turning solely on the "adequacy-willingness and ability" test cannot be justified and are clearly erroneous. There can be no doubt that this case was decided by the Commission on that basis. Nothing in the record before us warrants a denial of the application on any other grounds. Here a distinct need of an individual customer for specialized service and equipment was shown. A shipper desired it and asked for it, and within the scope of the revised definition of a contract carrier, the shipper's desires and the applicant's ability to meet them have achieved substantial pertinence.

Since the order denying the application must be vacated, we observe further that apart from the fact that a finding of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application, there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question. Since U.S.A.C. is not participating in the traffic and never

has been, the permit cannot possibly divert such traffic. There is no evidence in the record that if the permit is denied, U.S.A.C. or any other existing carrier will ever be permitted to serve the needs of Boeing. And in this connection it should be noted that in reaching the conclusion that the shipper will suffer no adverse effect because U.S.A.C. is willing and able to perform, the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier. The Commission has neatly solved the problem with its finding that common carrier service is "adequate". Inasmuch as the "willing and able" test at times seems indistinguishable from, and in the eyes of the Commission, synonymous with, the "adequacy test", a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's *"reasonable transportation needs"*, that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

We conclude that to the extent the Commission has ruled that the burden is on applicant to show the protesting common carriers are unable or unwilling to meet the shipper's reasonable transportation requirements, the standard is not supported by the language of Section 209(b), whether it goes under the guise of an "adequacy test" or otherwise. It in effect injects into the Act the very qualifications and limita-

tions suggested by the deleted portions of the amendment. The Commission may not rule that the proposed service fails to qualify as contract carriage under Section 203(a)(15) inasmuch as the service is, or may be "provided by common carriers." Neither may the Commission deny a permit under Section 209(b) because the applicant has failed to establish that existing common carriers are "unwilling or unable to provide the type of service for which a need has been shown."

We conclude generally that to the extent that the Commission has attempted to apply substantially the same tests for determining public convenience and necessity as it relates to common carriage to the narrowly restricted language of the statute relating to consistency with the public interest as it applies to contract carriage, the action is not supported by the language of Section 209(b).

It is of interest to note that at one time the Commission recognized a difference in the standards of proof required to show consistency with the public interest incident to a contract carrier's permit, as compared to the certificate of public convenience and necessity required for a common carrier. Earlier, it was required that once a contract carrier applicant had established a prima facie case, there was some burden on the protestants to come forward with evidence in rebuttal. See *Jason W. House Contract Carrier Application,* 1 M.C.C. 725. At about the same time the Commission held that the availability of adequate common carrier service alone did not preclude the granting of a contract carrier authority. See *T. J. Broom Contract Carrier Application,* 1 M.C.C. 425; *Howard W. Juett Contract Carrier Application,* 1 M.C.C. 268. Clearly the effect of the amended statute is to restore these procedures to a degree, and to give

emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case. And it is clear that under the narrow definition of contract carriage found in the new law, there is no occasion, necessity or warrant for the same standards of proof in both applications.

The Commission cites many of its own rulings since the 1957 amendments under the well established theory that contemporaneous construction of a statute by those charged with its execution is entitled to great weight and should be affirmed unless clearly erroneous. However, the construction of a statute is a matter ultimately for the Courts to determine. Where the Commission's construction is clearly erroneous, the rule contended for does not apply. See *Woods* v. *Benson Hotel Corp.*, 177 F. 2d 543, (8th Cir. 1949); *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 53 S. Ct. 768, 77 L. Ed. 1410; *Mid-Continent Petroleum Corp.* v. *N.L.R.B.*, 204 F. 2d 613 (6th Cir. 1953), certiorari denied 346 U.S. 856, 74 S. Ct. 71, 98 L. Ed. 369.

Plaintiff urges that we compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff, and requests that we direct the Interstate Commerce Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the Examiner. We have no such authority. Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner, or themselves to exercise administrative functions. See *Interstate Commerce Commission* v. *United States ex rel. Members of Waste Merchants' Association*, 260 U.S. 32, 43 S. Ct. 6, 67 L. Ed. 112; *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561; *Federal Power Commission* v. *Idaho*

Power Company, 344 U.S. 17, 73 S. Ct. 85, 97 L. Ed. 15.

In the final analysis the Commission has the responsibility for determining what is best for the public interest and the national transportation policy, weighing the various criteria that Congress has provided. The most that the courts may require is that all relevant factors be weighed carefully and fairly, and in this case, that no application be brushed aside upon the ground that an existing carrier wishes to perform the service. Again we emphasize that under the present statutory scheme, the shipper, the contract carrier and the common carrier all have coordinate interests; that there are now at least two forms of motor carrier service entitled to equal recognition, and that the interests of each must receive a fair consideration in reaching a determination which is consistent with the public interest and the policy of Congress with reference to national transportation.

For the foregoing reasons judgment will be entered setting aside the orders of the Interstate Commerce Commission and declaring them unlawful and void, and remanding the case to the Commission for further proceedings consistent with the rulings expressed here.

APPENDIX B

In the United States District Court for the Western District of Missouri, Western Division

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Filed Aug. 9, 1960

J. C. Truman, Clerk, by Arlie G. Grout, Deputy

No. 12497

J-T TRANSPORT COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before JOHNSEN and MATTHES, *Circuit Judges*, and SMITH, *District Judge*

This opinion prepared by Judge Smith and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto

***It is hereby ordered, adjudged and decreed* that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.**

(S) HARVEY M. JOHNSEN,
Circuit Judge.

(S) M. C. MATTHES,
Circuit Judge.

(S) R. JASPER SMITH,
District Judge.

APPENDIX C

Interstate Commerce Commission

No. MC–11185 (Sub-No. 100) [1]

J-T Transport Company, Inc., Extension—Columbus, Ohio

DECIDED JANUARY 31, 1958

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC–11185 (Sub-No. 100), of uncrated airplane parts and equipment, (except airplane engines) which because of their fragile nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC–11185 (Sub-No. 102), of aircraft assemblies from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

James F. Miller for applicant in No. MC–11185 (Sub-No. 100).

James W. Wrape and *Louis I. Dailey* for applicant in No. MC–11185 (Sub-No. 102).

Paul F. Sullivan and *James K. Knudson* for a protestant in both proceedings.

Douglas McHendrie and *Ernest A. Brooks II* for protestants in No. MC–11185 (Sub-No. 102).

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[1] This report also embraces No. MC–11185 (Sub-No. 102), J-T Transport Company, Inc., Extension—Indianapolis, Ind.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS HUTCHINSON, WALRATH, AND MCPHERSON

BY DIVISION 1:

These applications were heard separately and were the subject of separate reports and recommended orders of examiners. Since, however, related issues are involved, they will be disposed of here in a single report.

Exceptions to the order recommended by the examiner in the title proceeding were filed by protestant, and applicant replied. In the subtitled proceeding, exceptions to the order recommended by the examiner were filed by rail protestants and by a motor-carrier protestant, and applicant replied. Our conclusions differ from those recommended in each proceeding.

In the title proceeding by application filed October 17, 1956, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment (except airplane engines) which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio.

In No. MC–11185 (Sub-No. 102), by application filed March 14, 1957, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans.

U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., opposes both applications, and Ace Dran Hauling and Rigging Co., Daniel Hamm Drayage Company, Al Jeffries Trucking Co., Nieman Transfer and Storage Co., Taylor Heavy Hauling Co., Belger Cartage Service Inc., and class I rail carriers in western trunkline territory oppose the No. MC–11185 (Sub-No. 102) application.

The examiner in each proceeding recommended a grant in its entirety of the considered application. In the title proceeding, on exceptions, U.S.A.C. assigns error to the examiner's findings (1) that the shipper requires a type of service which cannot be rendered by it, and (2) that the evidence warrants the granting of the authority sought. It asserts that the examiner erred in failing to find that the shipper's support is based on preference rather than need for service. It also argues that the record does not establish a basis for the inclusion of the term "equipment" in the recommended commodity description, and that if any authority is granted applicant, it should be restricted to a one-way movement. Applicant in reply contends (1) that the record is clear that the shipper requires the specialized service proposed, (2) that applicant is the only carrier of record capable of performing this type of service, and (3) that a two-way service is needed. It urges approval of the examiner's findings.

On exceptions in No. MC–11185 (Sub-No. 102), rail protestants object to the commodity description recommended by the examiner as being too broad, stating that it should be limited to "landing gear bulkheads." In its exceptions U.S.A.C. asserts that the examiner's findings ignore the fact that it is a specialized common carrier of aircraft parts and is experienced in the handling of delicate or fragile shipments; that the

shipper's desire for a contract carrier with a terminal at Wichita is not in itself sufficient reason for granting the application; that it has equipment with which to perform a service similar to that proposed; that it is willing, if necessary, to modify its existing trailers to the extent required; and that existing common-carrier service has not been shown to be inadequate in any material respect. It further contends that in this and other pending proceedings applicant, with the cooperation of the supporting shipper, plans to siphon off lucrative traffic, leaving it to haul the less desirable shipments; that in so doing, applicant's *modus operandi* is to construct a special trailer before seeking operating authority, whereupon it asserts that no existing carrier has the type of equipment required to perform the proposed service. Applicant in reply denies generally the contentions of exceptants and urges that the application be granted.

The evidence adduced in each proceeding, the examiner's recommendations, the exceptions, and the replies thereto have been considered. We find the statements of facts contained in the examiners' reports to be accurate in all material respects, and, as hereinafter amplified or restated for clarity of discussion, we adopt such statements as our own.

Applicant is a contract carrier by motor vehicle of uncrated aircraft parts and equipment and conducts substantial operations between various points in the West and Midwest. It holds temporary authorities, conditioned to expire upon final determination of these proceedings, to transport the commodities from, to, and between the points applied for in the two applications. The application in the title proceeding is supported by North American Aviation, Inc., hereinafter called North American, and the other application

is supported by Boeing Airplane Company, hereinafter called Boeing.

North American manufactures principally military aircraft. It subcontracts for parts which are shipped to its Columbus plant for use in the assembly of finished aircraft. As pertinent here, certain items are purchased f.o.b. from subcontractors in Grand Prairie and Garland. These items are made of metal highly susceptible of damage and must be transported in closed equipment for reasons of protection and security. This shipper previously used air freight for the transportation of these items. However, when the airline introduced a type of plane whose smaller doors would permit the loading of certain of the items, the shipper requested applicant to perform the service. This shipper is using applicant's service from points of origin other than those involved here; and such service, together with that rendered by applicant under temporary authority, is satisfactory. Production schedules for the assembly of finished aircraft are such that the shipper must control and direct the movement of the considered commodities, and the traffic must be handled with meticulous care. Specially designed transportation equipment must be used. Applicant modified certain of its equipment to meet the specifications of the shipper.

Boeing assembles aircraft at Wichita. Prior to its use of applicant, this shipper used rail service for the transportation to its Wichita plant of landing-gear bulkheads from Indianapolis. Rail service proved unsatisfactory, however, because of slow transit time and because of the necessity of using expensive crating to protect the lading from damage. Specially designed motor-carrier equipment is required, and applicant modified certain of its equip-

ment to meet the specifications of this shipper. Applicant's service under temporary authority is satisfactory.

Two of the three motor common carriers which submitted evidence in opposition to the application in No. MC–11185 (Sub-No. 102) are so-called heavy haulers, one with authority to operate between points in Missouri and Kansas, and the other holding authority to operate between points in Indiana and Missouri. By an interline arrangement at Kansas City, these two claim to be able to handle aircraft landing-gear bulkheads to Boeing's satisfaction.

U.S.A.C. is authorized, as here pertinent, to transport aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) from Indianapolis to Wichita. It specializes in the transportation of aircraft parts and equipment, and operates 173 tractors and 225 trailers. It has a terminal at Dallas, Tex., approximately 15 miles from Grand Prairie and Garland, and one at Wichita. It is willing and able to modify as much of its equipment as is needed to meet the shippers' specifications but has never been requested by either supporting shipper to do so. Because of its specialization in the transportation of aircraft parts and equipment, it is able to adapt its operations to any production schedules which shippers may set up. Neither North American nor Boeing has attempted to avail itself of the services of U.S.A.C. or, so far as these records show, of any other common carriers.

Here we have a situation in which the supporting shippers have made no attempt to utilize the services of existing carriers, one of which specializes in the transportation of the commodities here involved. True, applicant specially modified certain trailers for

use in the transportation of the aircraft parts here involved and has satisfactorily served the supporting shippers under its temporary authorities. But neither these facts nor the desire of the supporting shippers to continue utilizing applicant's service, standing alone, is sufficient to warrant a grant of the authority sought. The existing services of the opposing carriers which appear to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to be inadequate. In fact, no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers. The burden is upon an applicant seeking contract-carrier authority, as well as one seeking common-carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet. Compare *Girton Bros., Inc., Extension—Louisville,* 69 M.C.C. 229, and *Warren Transport, Inc., Common Carrier Application,* 69 M.C.C. 241. A service not needed cannot be found consistent with the public interest or the national transportation policy.

In No. MC–11185 (Sub-No. 100) and No. MC–11185 (Sub-No. 102), we find that applicant has failed to establish that the respective proposed operations are consistent with the public interest and the national transportation policy, and that each application should be denied. An appropriate order will be entered.

COMMISSIONER WALRATH, being necessarily absent, did not participate in the disposition of these proceedings.

APPENDIX D

Interstate Commerce Commission

No. MC–11185 (Sub-No. 100)[1]

J-T Transport Company, Inc., Extension—Columbus, Ohio

DECIDED JUNE 15, 1959

Upon reconsideration, findings in the prior report, 74 M.C.C. 324, decided January 31, 1958, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC–11185 (Sub-No. 100), of uncrated airplane parts and equipment (except airplane engines), which because of their fragile nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC–11185 (Sub-No. 102), of aircraft assemblies uncrated, which because of their fragile nature require special handling and special equipment, from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

Appearances as shown in the prior report, and, in addition, *Harry R. Brashear, Clarence D. Todd, Dale C. Dillon, Vern W. Porter, Robert J. McBride, Albert B. Rosenbaum, Roland Rice, John C. Bradley,* and *James E. Wilson* for interveners in one or both applications.

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[1] This report also embraces No. MC–11185 (Sub-No. 102), J-T Transport Company, Inc., Extension—Indianapolis, Ind.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In these proceedings J-T Transport Company, Inc., of Kansas City, Mo., seeks permits authorizing operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC–11185 (Sub-No. 100) of uncrated airplane parts and equipment (except airplane engines), which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC–11185 (Sub-No. 102) of aircraft assemblies,[2] uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans. U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., opposes both applications and six so-called heavy haulers, and class I rail carriers in western trunkline territory also oppose the No. MC–11185 (Sub-No. 102) application.

In the prior report, 74 M.C.C. 324, decided January 31, 1958, division 1 denied both applications. Petitions for reconsideration and a request for oral argument were filed by applicant in each proceeding; Aircraft Industries Association of America, Inc., and the Contract Carrier Conference of the American Trucking Associations, Inc., filed petitions for leave to intervene in support of applicant and for reconsideration or further hearing in both proceedings; and North American Aviation, Inc., intervener in support of applicant, filed a petition for reconsideration in the title proceeding. U.S.A.C. replied to each petition.

[2] Applicant in its petition for reconsideration and request for oral argument, dated April 12, 1958, indicated a willingness to restrict the commodity description to "landing gear bulkheads."

By order of July 25, 1958, Aircraft Industries Association and the Contract Carrier Conference were permitted to intervene, and the petitions were denied in all other respects. Upon further consideration of the records and of second petitions in each proceeding by applicant for reconsideration, and of replies thereto by U.S.A.C., we reopened the proceedings for reconsideration on the present records. Subsequently, the Common Carrier Conference-Irregular Route and the Regular Common Carrier Conference of the American Trucking Associations, Inc., were permitted to intervene.

The material facts in each proceeding are not in dispute. Applicant, a motor contract carrier of uncrated aircraft components and assemblies, conducts operations between various points in the West and Midwest. It maintains terminals at Wichita and Kansas City, Kans., and Grand Prairie, and operates 33 tractors and 45 trailers. Each of its trailers is suitable for transporting aircraft parts, and each is equipped with special fixtures designed to handle the particular parts transported. It regularly assigns certain vehicles to each of its various customers for its exclusive use, and at the time of the hearing was serving eight different aircraft manufacturers. Its drivers have security clearance.

North American Aviation, Inc., hereinafter called North American, supports the title application. It is a principal contractor with the Federal Government for certain types of military aircraft which it produces at its plant in Columbus. Certain component parts of these aircraft, such as fuselage sections, flaps, tips, and pylons, are purchased f.o.b. from subcontractors located at Grand Prairie and Garland. These items are constructed principally of titanium, aluminum, and stainless steel and are highly sus-

ceptible to damage; therefore, they must be transported in specially fitted, closed equipment for protection as well as for security reasons. Because of their intended use as components of airplanes, it is essential that the parts arrive in perfect condition. Likewise, dependable service is of the essence as it is not practicable to stockpile these articles; and, unless the parts arrive undamaged and according to schedule, North American's assembly-line schedule is disrupted. This shipper formerly used airfreight for the transportation of these items but occasionally there was damage to some of the parts which moved by air; and when the airline introduced a type of plane whose smaller doors would not permit the loading of certain of the items it requested applicant to provide the service. Applicant modified 2 of its trailers to fit specifications submitted by this shipper; assigned this equipment to its exclusive use; and pursuant to appropriate temporary authority transported 18 shipments between Grand Prairie and Garland, on the one hand, and, on the other, Columbus during a 3-month period. Its service was entirely satisfactory and the shipper desires its continuance. Although the shipper knew of U.S.A.C.'s service, it did not request this carrier to provide equipment or offer it the traffic.

Boeing Airplane Company, hereinafter called Boeing, supports the No. MC–11185 (Sub-No. 102) application. A manufacturer at Indianapolis supplies Boeing with landing-gear bulkheads which it installs in planes at its Wichita assembly plant. The dimensions of the forward and aft bulkheads are 128 by 90 by 42 inches and 122 by 181 by 24 inches, and they weigh 1,380 and 1,340 pounds, respectively. The service needed as regards the movement of landing-gear bulkheads are similar to those of North American in

that these articles, because of their nature, must be transported in specially designed, closed equipment, with their delivery being made in accordance with Boeing's production schedule. While applicant must deadhead its equipment 700 miles from Wichita to Indianapolis to perform the proposed service, it has sufficient advance notice to schedule the movement. Prior to the use of its service under appropriate temporary authority the shipper used rail service, but the necessity of constructing special containers made the cost of this service prohibitive. During a 4-month period applicant transported about four shipments a month in one of its trailers equipped with special fixtures for transporting this particular shipper's traffic and assigned to the exclusive use of the shipper. This service has been highly satisfactory. Although the shipper knew that U.S.A.C. was authorized to perform the proposed service, it did not request that carrier to supply equipment for the reasons that U.S.A.C.'s tariff provides that it can exercise control over the type of equipment that will be used for any particular shipper, and, in 1953, it had unsatisfactory experiences in the use of U.S.A.C.'s service.

U.S.A.C. holds certificates authorizing it, insofar as here pertinent, to transport, over irregular routes, aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) between Indianapolis and Wichita. Approximately 60 percent of its traffic consists of aircraft parts other than engines and the remainder consists principally of aircraft engines. As a result of having served the aircraft industry almost exclusively over a period of years, it is accustomed to modifying its equipment to meet the specific requirements of particular aircraft manufacturers, and it is able to tailor its service to fit the pro-

duction schedules esablished by its customers. It maintains, among others, terminals at Dallas, Tex., approximately 15 miles from Garland and Grand Prairie, and at Topeka, Kans., and Indianapolis. It operates 173 tractors and 225 trailers, some of which, if fitted to the shippers' specifications, would be suitable for transporting the considered traffic. Its drivers are required to have security clearance. If tendered the considered traffic, it would modify and make available to the shippers whatever equipment is necessary to meet their transportation requirements.

Two so-called heavy haulers, both common carriers, submitted evidence in opposition to the No. MC–11185 (Sub–No. 102) application. Belger Cartage Service, Inc., holds authority to operate between points in Missouri and Kansas, and Daniel Hamm Drayage Company is authorized to operate between points in Indiana and Missouri. By interlining at Kansas City, they purport to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction. There is also interline rail service from Indianapolis to Wichita.

In the prior report division 1 found that the motor transportation desired by North American and Boeing could be provided adequately by U.S.A.C.; that there was no need shown for the proposed service; and that the applicant had failed to establish that the proposed operations would be consistent with the public interest and the national transportation policy. On petition applicant contends (1) that the type of service required to meet the supporting shippers' reasonable transportation requirements in each proceeding can only be provided by a contract carrier; and that protestants, all common carriers, are not authorized to perform such service, (2) that the decision in the prior report is at variance with that of the district

court in *Bass* v. *United States*, 163 F. Supp. 1, hereinafter referred to as the *Bass* case, because of a failure to consider whether adequate contract-carrier service was available, (3) that the criteria as set forth in sections 203(a)(15) and 209(b), as amended, of the Interstate Commerce Act, must be determinative of applications seeking contract-carrier authority, and that proper consideration has not been given to these sections of the statute, (4) that the legislative history preceding the 1957 amendments to the sections referred to in (3) above reveals that willingness and ability of common carriers to transport the traffic should not bar a grant of contract-carrier authority, (5) that as a practical matter, U.S.A.C. does not have the specialized equipment required for the considered movements, could not adapt its equipment to handle this traffic, and is unable to provide the personalized service which the supporting shippers require, and (6) that a denial of the applications would give U.S.A.C. a monopoly with respect to the traffic.

U.S.A.C. replies (1) that, as a specialized carrier of aircraft parts, albeit a common carrier, it offers and can provide substantially the same type of service as that proposed by applicant; and that it is willing to modify its equipment to meet the shippers' specialized needs and to dedicate certain of its equipment to the shippers' exclusive use, (2) that sections 203(a)(15) and 209(b) do not contain the sole elements for consideration in the disposition of applications for contract-carrier authority, (3) that the 1957 amendments to the act affecting contract carriers do not relieve an applicant seeking contract-carrier authority of the burden of establishing a need for the proposed service, (4) that, inasmuch as the supporting shipper in each case has failed to use its services, existing service

has not been shown to be inadequate, and (5) that it should be afforded a reasonable opportunity to demonstrate its available service before an additional competitive service is authorized.

DISCUSSION AND CONCLUSIONS

In view of the issues raised by the pleadings with respect to the interpretation to be placed upon the 1957 amendments of sections 203(a)(15) and 209(b) of the act, we deem it appropriate to discuss fully the matters of statutory construction presented herein in the light of the background of our prior consideration and disposition of applications for contract-carrier operating authority, of decisions in which the distinction between common and contract carriage has been explored, and of the events which led to the enactment of these amendments.

Prior to the 1957 amendments to the act, the definition of a contract carrier by motor vehicle, contained in section 203(a)(15) provided:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

The definition of a common carrier by motor vehicle, which was not affected by the 1957 changes in the act, contained in section 203(a)(14) reads:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation * * *.

Over a period of some 20 years literally hundreds of new service or extensions-of-service contract-carrier applications requiring the application of the above-stated definition in relation to other sections of the act have been considered and disposed of by this Commission. In these proceedings certain distinctions between motor contract carrier and motor common carrier operations have evolved, and for a clear understanding of the matters under consideration here some discussion of this historical development preceding the 1957 amendments is appropriate at this point.

The only limitation imposed by definition upon transportation which may be provided by a motor common carrier is that it must be held out to the public generally. In other words, a motor common carrier is required through its tariffs to make a continuing offer to the general public of any service which it proposes and which it is authorized to perform. Other than this requirement and those limitations contained in its certificate with respect to commodities, territories, or otherwise, no restriction is imposed upon the manner in which a common carrier may perform its physical operations, provided, in all instances, that the same service is made available to all who may desire to use it. It may perform, and in numerous instances the terms of its certificate limit its operations to the performance of, a so-called special service. On occasions the very terms of a common carrier's certificate make it necessary for it to provide special vehicular equipment such as a tank vehicle or a lowboy unit, and the inherent nature of the service authorized confines its activities to a certain industry. Within the terms of its certificate, however, it is under a duty to serve all members of the public desiring its service.

Thousands of certificates authorizing special types of operations have been issued; and U.S.A.C.'s operation is a classic example of a common carrier "specializing" in service for a particular industry. Its services are legitimately within the scope of a common carrier's function if such services are held out to all who can use them. Fundamentally, each service performed by a common carrier must, of necessity, be "specialized" to a certain degree to meet the particular needs attending the movement of any commodity. What could be more specialized than the services furnished by the so-called oilfield carriers to the oil and gas industries? The nature and variety of the services of these common carriers, both with respect to the commodities handled and the special equipment and other facilities furnished, is detailed in *Mercer Extension—Oil Field Commodities,* 74 M.C.C. 459; and many similar situations could be cited. The conclusion, therefore, is inescapable that a motor common carrier may, in accordance with the statutory definition, physically provide all transportation services within the scope of its authority, consistent with its duty and obligations as a common carrier, and with any degree of specialization necessarily inherent to the traffic transported.

On the other hand, specialization has always been a factor considered by us when it is necessary to determine whether an operation is common or contract carriage, as, for example, in *Craig Contract Carrier Application,* 31 M.C.C. 705, 712, where it was stated:

> We recognize, of course, that even specialization in physical operation does not necessarily negative a common-carriage status where, for example, such physically specialized services are affirmatively held out to all shippers in that particular class of the public having a need therefor. But, on the other hand, we are con-

> vinced that the lack of one or the other forms of specialization above indicated conclusively negatives contract carriage as contemplated by section 203(a)(15) of the act.

In commenting on this report, the Supreme Court in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409, 411, said: "A requirement of specialization is supported by respectable legislative history."

As seen, prior to these amendments, even where a highly specialized service was proposed, the existence of common-carrier service, if any, and whether or not that service would meet the reasonable transportation needs of those supporting the application, was always considered in our determination of applications for contract-carrier authority. The ability of common carriers to compete with contract carriers for the same traffic has been recognized from the inception of motor carrier regulation in 1935, and in each contract-carrier application opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application. Early, in *C. & D. Oil Co. Contract Carrier Application*, 1 M.C.C. 329, 332, an application for contract-carrier authority, it was said:

> We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed.

For many years this principle has been followed in disposing of applications for contract-carrier permits

opposed by common carriers, the decisive factor being whether the available common-carrier service was reasonably adequate to meet the transportation needs involved.[3]

The import of applicant's position here is that under the 1957 legislation this long-established principle has been abandoned, and that this legislation was intended not only to delineate the distinction between common and contract carriage, but was also intended so to separate these two types of motor transportation as to virtually eliminate the ability of a common carrier to compete with a contract carrier for the same traffic, and thus to render the fact that motor common carrier service available is of little or no weight in the disposition of contract-carrier applications. In our view such a position is untenable.

As of August 22, 1957, the definition of a contract carrier by motor vehicle in section 203(a)(15) of the act was amended to read as follows:

> The term "contract carrier by motor vehicle" means any person which engages in the transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the

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[3] *Arrow Transp. Contract Carrier Application*, 73 M.C.C. 261; *Refiners Transport, Inc., Extension—Missouri*, 71 M.C.C. 272; *Overland Freight Lines, Inc., Extension—Kentucky*, 69 M.C.C. 143; *Guex Extension—Chicago Commercial Zone*, 67 M.C.C. 224; *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561; and *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311.

> furnishing of transportation services designed to meet the distinct need of each individual customer.

At the same time section 209(b) was also amended. As pertinent, it provides that:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shippers and the changing character of that shipper's requirements.

Both amendments were enacted as a result of certain proposals made by us to Congress in our 70th annual report, wherein we noted at page 163 that amendments were needed to "preserve" the distinction between contract and common carriers and to insure that all contractual arrangements of contract carriers would cover only individual and specialized service. As we have indicated, these proposals were prompted by the fact that under the prior law, as construed by the courts, contract carriers were free to add contracts within the scope of their permits. Before the decision in *United States* v. *Contract Steel Carriers, Inc., supra,* there were instances in which some contract carriers expanded their activities to such an extent that they were serving numerous shippers and were otherwise conducting their operation in a manner which raised serious doubts as to whether they were operating lawfully as contract carriers. Proceedings were instituted against certain of these carriers, and among the factors considered in deter-

mining whether they were operating as bona fide contract carriers was the number of transportation contracts into which they had entered. *Transportation Activities of Fischbach Trucking Co.*, 61 M.C.C. 185; *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 51 M.C.C. 355, 52 M.C.C. 33, and 52 M.C.C. 261. *United States* v. *Contract Steel Carriers, Inc., supra,* in effect, served to preclude consideration by us of the number of the shippers served as one of the criteria for determining such proceeding, and opened the door to contract carriers to negotiate an unlimited number of transportation contracts. Thus too often the distinction between contract- and common-carrier service vanished, since contract carriers, owing to their ability to negotiate numerous additional contracts, were in effect offering their services to the public generally. It was to preserve or reinstate the distinction between common and contract carriage, both with respect to specialization and the number of shippers to be served that the 1957 amendments were enacted.

As originally proposed, section 203(a)(15) would have defined a contract carrier as one which, among other things, furnishes transportation service "not provided by common carriers" and section 209(b) would have required that this Commission, before granting contract-carrier authority, make the findings, among other things, that "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." While Congress was still considering this proposal, we concurred in the deletion of the above-quoted language for the reason that it was not considered necessary to carry out the purpose of the amendments. This deletion should not be construed as an expression of an intention on the part of Congress to eliminate

the standing of common carriers to oppose contract-carrier applications, but rather its purpose was to insure that too heavy a burden of proof was not imposed upon contract-carrier applicants. Thus, in explaining to the Senate Subcommittee on Surface Transportation the proposed modifications in the bill to revise the definition of the term "contract carrier by motor vehicle," we noted:

> These words are not necessary to carry out the purpose of the bill and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized service.[4]

And former Chairman Clarke who, in testifying before the same Senate subcommittee, stated:

> I wish to state at this point, that because of the very difficult burden of proof that would be imposed on applicants by the last mentioned provision (that is, that additional permits may be issued only upon a showing that existing common carriers are unable or unwilling to render the required type of service), the Commission, upon further consideration, has voted to withdraw its recommendation to amend section 209(b) in this respect.[5] [Matter in parenthesis added.]

We think it clear that the purpose of Congress in enacting the 1957 amendments was to sharpen the distinction between common and contract carriage by imposing upon contract carriers specific restrictions as to the number of the shippers which they may serve and the type of service which they may perform;

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[4] S. Rep. No. 703, 85th Cong., 1st sess. 5 (1957).

[5] Hearing before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce 85th Cong., 1st sess., at 22 (1957).

that Congress did not intend or even contemplate the abandonment of our long continued practice of considering the adequacy of existing common- as well as contract-carrier service in determining whether a need has been established for a proposed contract-carrier operation; and that there is no indication in the language of these amendments or in the legislative history surrounding their enactment that Congress intended to place any limitation upon the type of service which a common carrier may lawfully perform. Plainly there was no intention to enhance the economic position of the contract carrier at the expense of the common carrier. We conclude therefore, that a common carrier may perform, as it could prior to these amendments, a variety of specialized services, so long as it operates within the scope of its certificates and holds itself out to perform these same services for all members of the particular segment of the shipping public which has a need for them and which it is authorized to serve. And certainly there is nothing in the legislative history or elsewhere to support the proposition that, under the amendments, an applicant, once it establishes that its proposed operation falls within the definition of contract carriage, is entitled automatically to a grant of authority consistent with the desires of the supporting shippers, regardless of the availability of common-carrier service, or even contract-carrier service. Such a construction would negative the history of the new legislation and run contrary to the provisions of the national transportation policy which must be considered in the disposition of all applications for operating authority.

Section 209(b) as it now reads sets out certain criteria which we must consider in determining

whether a grant of authority will be consistent with the public interest and the national transportation policy. Most of these points may be best discussed in relation to the peculiar facts of the instant applications, but it should be noted here that one of the factors to be considered is the effect which a grant of authority would have upon the services of protesting carriers. The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them. The question presented, then, is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of "potential" traffic, even if they may not have handled it before. Any doubt that we might have that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized is disspelled by the specific wording of section 209(b), and a number of applications for contract-carrier authority have, in fact, been denied since the passage of the 1957 amendment in spite of the

fact that the only opposition was that of common carriers.[6]

It should also be pointed out here that there is no indication that Congress intended the criteria contained in section 209(b) to be exclusive or to preclude our consideration of other factors in determining contract-carrier applications. It has consistently been held that all sections of the act must be interpreted and administered in accordance with the national transportation policy which provides, as pertinent:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *

In Schaffer Transp. Co. v. *United States,* 355 U.S. 83, 88, hereinafter sometimes referred as the *Schaffer* case, the Supreme Court said: "[T]his Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." The congressional mandate could not

[6] *Wagner Contract Carrier Application*, 77 M.C.C. 777; *Coastal Motor Lines Contract Carrier Application*, 77 M.C.C. 510; *Woodward Extension—Woodblocks*, 76 M.C.C. 377; and *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254.

be carried out if we were to close our eyes to any matter which might affect the good of the national transportation system as a whole. Surely sound economic conditions in the transportation industry could not be maintained if common carriers, who have the obligation of providing service to the public at large within the scope of their authorities, were faced with a situation in which available traffic could be, as it were, withdrawn from general circulation and given to contract carriers without these common carriers being given the opportunity to make an effective showing of their willingness and ability to provide needed service.

DETERMINATION OF THE INSTANT APPLICATIONS

We think that the application of the foregoing principles to the instant applications justifies some repetition of matters previously discussed generally. In deciding any application for contract-carrier authority we must consider whether the operation proposed and the overall operations of the applicant are those of a contract carrier. As noted, under the amended definition of a contract carrier (section 203(a)(15)), a person, in order to be a contract carrier (1) must be a carrier for hire, but not a common carrier; and (2) must serve, under continuing contracts, one or a limited number of persons, and either (*a*) assign vehicles for a continuing period of time to the exclusive use of each person served or (*b*) furnish services designed to meet the distinct need of each individual customer.

Applicant presently has contracts with nine aircraft manufacturers, and all of its pending applications, including the two under consideration here, are supported by the shippers with which it already

has contracts. Applicant does not hold out its service to the public generally, but offers to serve only these nine shippers. We conclude, therefore that it is a for-hire carrier, but not a common carrier as defined in the act, and serves a limited number of persons under continuing contracts. In addition, its usual practice is to assign vehicles to the exclusive use of individual customers for continuing periods of time, and it would follow this practice wth respect to the service proposed here should the instant applications be granted. In view of the unusual design and fragile nature of the subject articles, the security considerations, and the necessity for coordinating the delivery of the considered items with the shippers' production schedules, it is obvious that applicant proposes to render a specialized service. Taking all these matters into consideration, we think it clear that the operations proposed come within the new definition of contract carriage.

Also, as previously noted in determining whether a grant of contract-carrier authority will be consistent with the public interest and the national transportation policy, we are required by section 209(b) to give consideration to the following factors: (1) The number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon the services of protesting carriers, (4) the effect of a denial on applicant and its supporting shipper, and (5) the changing character of the shipper's requirements.

The first factor, the number of shippers to be served, is, as we understand it, to be considered on the basis of applicant's present and proposed situation in relation to the question whether applicant intends to serve "one or a limited number of shippers," and

is thus a bona fide contract carrier as defined in section 203(a)(15) of the act. As seen by the foregoing, applicant meets this particular requirement.

The next factor, the nature of the proposed service, is one which must be considered particularly carefully in any case such as this where a contract-carrier application is opposed by a common carrier. We must determine whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. It should be noted here that the requirements of many shippers could quite satisfactorily be met by either a common or a contract carrier. If the carrier serves a limited number of shippers under continuing contracts and assigns vehicles to the exclusive use of each, it meets the statutory definition of a contract carrier, even though the equipment supplied or the service which it renders may be indistinguishable from that offered by common carriers. We have already determined that the service applicant proposes meets this definition.

The requirement of section 209(b) that we consider the effect which a grant of authority would have upon the services of protesting carriers has, we believe, been adequately discussed. It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories

they serve before a competitive service is authorized is sound doctrine, in the public interest, and in furtherance of the national transportation policy, whether the application is one for common- or contract-carrier authority.

Section 209(b) next requires us to consider the effect of a denial on applicant and its supporting shipper. With respect to the effect of a denial on applicant, we note that although applicant has incurred substantial expense in fitting certain of its trailers to the shippers' specifications, this equipment is of the type which is suitable generally for transporting aircraft parts and may, with modifications, be used to handle other traffic. In any event, both applicant and its supporting shippers knew or should have known that U.S.A.C held the requisite authority to provide the proposed services, and therefore their agreement and the expenditures made by applicant prior to the filing of the application cannot be allowed to be controlling, of themselves, in resolving the issues presented here. Any other construction of such pre-application action by either a shipper or a prospective applicant would open the door to numerous abuses and thwart the basic purpose of our regulation and the national transportation policy.

Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of the shippers having transportation require-

ments similar to those of these supporting shippers, and it is dependent upon the very kind of traffic that is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offer such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the exclusive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service.

Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to

be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary, the very business of U.S.A.C. is the transportation of the type of traffic involved.

The final matter which section 209(b) directs us to consider in determining contract-carrier applications is the effect which a denial would have upon the changing character of the shipper's requirements. What this criterion refers to, we believe, are situations in which a shipper presently being provided with a complete transportation service by a contract carrier experiences a change in such things as the marketing areas which it serves, the commodities which it handles, or the location of its plants, which require that its carrier acquire additional operating authority if it is to continue to render a complete service. There is no indication that such a situation exists here with respect to either of the two supporting shippers.

At this point we wish to make clear, as hereinbefore indicated, that the matters discussed are not the only ones which should or can be considered in the determination of contract-carrier applications. While they embrace the important considerations of the need for the proposed service and the adequacy of existing service, they are not all inclusive, and other factors affecting the public interest and the national transportation policy may, and in some cases must, be considered. Where, for example, the issuance of a permit would result in objectionable dual operations by applicant as a common and contract carrier, this fact must be considered. Likewise, the relationship of the supporting shipper to the applicant may be an opponent's important objection to the proposed opera-

tion and would have to be dealt with from the standpoint of the public interest and our duty under the national transportation policy.

Although applicant argues that denial will give U.S.A.C. a monopoly with respect to the traffic, it appears that there is only sufficient traffic to support one carrier's operation and that U.S.A.C. should be given an opportunity to transport it before a new carrier is permitted to enter the field. In the circumstances, we consider its argument as to monopoly to be without merit.

In our opinion nothing herein is inconsistent with the results obtained in the *Bass* case or in *Schaffer Transp. Co.* v. *United States, supra,* cited by applicant in its pleadings. Rather than support for applicant's position the *Bass* case is in accord with the findings made here. There the court affirmed this Commission's denial of an application for contract-carrier authority to perform a charter passenger service in which our action was based solely on the ground that existing common carriers could meet the needs of the public for charter service. Although the court stated, *inter alia,* that there is a duty to determine "whether the existing contract service is adequate" in a proceeding in which an applicant seeks authority to perform a "contract service," the court apparently was referring to the peculiar characteristics of a charter bus service where a group collectively contracts for the exclusive use of certain equipment. In our opinion, the court did not imply, as applicant suggests, that where contract-carrier authority is sought this Commission must grant a permit where there is no contract carrier available to perform the service regardless of the existence of adequate common-carrier service. We are of the further opinion

that even though the decision of division 1 in the Bass application was reached prior to the 1957 amendments to the act, the conclusion reached by the court that available common-carrier service must be given consideration in an application for contract-carrier authority continues to be valid.

In the *Schaffer* case the Supreme Court held that, when deciding an application for motor-carrier operating authority, we must consider, among other things, the inherent advantages of the several modes of transportation. Contract and common carriage by motor vehicle are not separate modes of transportation but rather are subdivisions of the same mode, that is, motor transportation. Consequently where, as here, it appears that a motor common carrier is able to furnish a service substantially similar to that proposed by a motor contract carrier applicant, the *Schaffer* case does not negate our long-continued policy of giving consideration to the effect on existing common carriers before approval is given to a grant of additional motor-carrier authority, whether it be contract or common; nor do we believe it requires any different result from that reached here.

Therefore, we conclude in each proceeding, (1) that the character of the shippers' transportation requirements is not such as to preclude their performance by a common carrier, (2) that U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application, (3) that in view of the adequacy of existing common-carrier service the supporting shippers would not be materially affected by a denial of the applications, (4) that the potential loss of traffic to U.S.A.C. outweighs any detriment to applicant, (5) that to authorize the proposed operations will not be consistent with the public

interest and the national transportation policy, and (6) that under the circumstances both applications should be denied.

FINDINGS

On reconsideration, in Nos. MC–11185 (Sub-No. 100) and MC–11185 (Sub-No. 102), we find that applicant has failed to establish that the proposed operations will be consistent with the public interest and the national transportation policy; and that each application should be denied.

An appropriate order will be entered.

COMMISSIONER FREAS concurs in the result.

COMMISSIONER WALRATH, concurring:

While I concur in the result reached by the majority, I would have preferred for the report to cover more fully the matter of services that a contract carrier must, under the amendments, now provide.

COMMISSIONER WEBB, concurring:

Weighing the five tests prescribed by section 209(b) of the act for determining whether a permit should be issued, I agree with the result reached by the majority. It seems to me, however, that the report prescribes a sixth test not authorized by the Congress and, in fact, a test considered by the Congress and deliberately rejected. The report seems to me to convey the impression that if an applicant for contract-carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of section 209(b) have been satisfied.

What I call the sixth test prescribed by the report is the conclusion that in each contract-carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shipper's reasonable transportation requirements. The conclusion, in my opinion, is not

supported by the language of Public Law 85–163 or by the pertinent legislative history.

When the bill (S. 1384) which became Public Law 85–163 was introduced, it amended section 203(a)(15) of the act so as to define a contract carrier as one who conducts its business other than as a common carrier and—

> under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*

The Senate Committee on Interstate and Foreign Commerce deleted the language italicized above. In addition, the Committee eliminated from the bill the requirement of a showing under section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the Committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers." As thus amended, the bill was enacted into law.

Obviously, there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted that language solely because it required an impossible burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in section 203(a)(15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in section 209(b) "that *protestant* com-

mon carriers are unwilling or unable to provide the type of service for which a need has been shown."

Contract carriers opposed the bill as originally introduced on the ground that to require proof as to the nonexistence of adequate common-carrier service would prevent extension of, if not destroy, contract-carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public convenience and necessity standard in section 209 proceedings disappeared when, under the new law, permits ceased to be unrestricted licenses for hunting traffic. As I see it, the report attempts to write into sections 203(a)(15) and 209(b) language deliberately stricken by the Congress. The report converts compromise legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating legislative defeat for contract carriers.

COMMISSIONER MCPHERSON, dissenting:

On reconsideration I now conclude that the applications should be granted.

The shippers require a service in which vehicles are assigned to them for their exclusive use for continuing periods of time. The protestants hold authority which is broad enough. However, the question is not restricted merely to the holding of appropriate authority, but also embraces the service which the shippers require. The specialized service required by these shippers is within the definition of contract carriage.

In weighing the effect of a grant or denial would have upon the services of the protestant, and the applicant, and/or the shipper, I would decide in favor of a grant in these particular cases.

COMMISSIONERS MITCHELL, ARPAIA, and WINCHELL did not participate.

APPENDIX E

STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., notes preceding Sections 1, 301, 901, and 1001, enacted September 18, 1940, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August

22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 State. 411–12, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 209

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by

motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That

no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

U.S.A.C. TRANSPORT, INC.,
COMMON CARRIER CONFERENCE — IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

AND

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

On Appeal from the United States District Court for the Western District of Missouri—Western Division

JURISDICTIONAL STATEMENT

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December 5, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Appeal from the United States District Court for the Western District of Missouri—Western Division

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri is reported at 185 F. Supp. 838. Because it is relatively long and since it is set forth as Appendix A to the Jurisdictional Statement being concurrently filed by the Interstate Commerce Commission, we respectfully ask leave to

treat that opinion thus reproduced as if incorporated herein. The decisions of Division 1 of the Interstate Commerce Commission and of the entire Commission appear, respectively, at 74 M.C.C. 324 and 79 M.C.C. 695. Because they are set out as Appendices C and D, respectively, to the Jurisdictional Statement being concurrently filed herein by the Interstate Commerce Commission, and because they are quite lengthy, we respectfully ask to treat those decisions thus reproduced as if incorporated herein.

JURISDICTION

The suit was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court, attached as Appendix A, was entered on August 9, 1960, and notice of appeal was filed in that court by U.S.A.C. Transport, Inc., Common Carrier Conference — Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., on October 7, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *M. & M. Transportation Co.* v. *U. S.*, 350 U.S. 857, *Frozen Food Express, Inc.* v. *U. S.*, 351 U.S. 40, *American Trucking Associations, Inc., et al.* v. *Frisco Transportation*, 358 U.S. 133, and *American Trucking Associations, Inc., et al.* v. *U. S., et al.*, 364 U.S. 1.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, and Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), are set forth verbatim in Appendix B.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission is now required by law to grant to a motor contract carrier applicant therefor a permit regardless of the existence of motor common carriers able and willing to provide the considered service.

2. Whether in interpreting Section 209(b) of the Interstate Commerce Act requiring the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers" the District Court erred in holding that the test relates only to diversion of traffic presently enjoyed in serving the affected shipper and excludes consideration of diverting potential traffic which the protesting carriers are willing and able to transport.

3. Whether the District Court erred in concluding that the Interstate Commerce Commission, in its denial of a permit to applicant, placed upon applicant the burden of proving inadequate the services of existing carriers.

4. Whether the District Court erred as a matter of law in limiting the factors which the Commission may consider in granting or denying a contract carrier application so that only the factors enumerated in the 1957 amendments to Section 209(b) are relevant.

STATEMENT

This proceeding had its genesis when appellee, J-T Transport Company, Inc., (J-T) filed an application on March 14, 1957, with the Interstate Commerce Commission for additional operating authority as a contract carrier by motor vehicle in order to transport aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans., over irregular routes. A hearing was held on this extension application before an examiner of the Commission and the application was opposed by various railroads as well as by several motor carriers, including appellant U.S.A.C. Transport, Inc., hereinafter called U.S.A.C.

U.S.A.C. is a specialized motor common carrier presently authorized to transport, insofar as here material, aircraft parts, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between the points involved. The record in the administrative proceeding shows that U.S.A.C. solicited the instant traffic (R. 70);[1] and that the shipper was aware that U.S.A.C. held the necessary operating rights to transport the items here involved. (R. 66) While an alleged unsatisfactory experience with U.S.A.C. was mentioned by the shipper witness at the Commission hearing, the witness was unable to answer specific questions with respect thereto and the hearing examiner prohibited counsel for U.S.A.C. from cross-examining the shipper

[1] "R" refers to pages in the hearing transcript transmitted to this Court as part of plaintiffs' exhibit A in the record of the court below.

witness on this alleged experience on the ground that it was too remote in time. (R. 67)

The hearing examiner, in a recommended report and order, proposed that the application be granted. After U.S.A.C. and the railroad protestants filed exceptions to the recommended report and order and appellee J-T replied thereto, Division 1 of the Commission denied the application in a report and order dated January 31, 1958, appearing in 75 M.C.C. 324. In denying the application, said Division concluded, *inter alia*, that: "A service not needed cannot be found consistent with the public interest or the national transportation policy."

Shortly thereafter, petitions for reconsideration and replies thereto were filed, but the entire Commission sustained the Divison 1 decision, and denied the petition for reconsideration by order dated July 25, 1958. Subsequently, appellee J-T Transport filed another petition for reconsideration with the Commission based on a Commission decision allegedly inconsistent with the Commission decision under consideration herein. The Commission granted this second petition for reconsideration and reopened the proceeding. Petitions for leave to intervene in the reopened proceeding were filed by the Common Carrier Conference — Irregular Route and by the Regular Common Carrier Conference, both affiliated with the American Trucking Associations, Inc., and both joint appellants herein. On June 25, 1959, the entire Commission issued a report on reconsideration, dated June 15, 1959, 79 M.C.C. 695, again denying the appellee's application, along with another application not here involved. In denying the application, the Commission held:

". . . It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories they serve before a competitive service is authorized is sound doctrine, in the public interest, and in the furtherance of the national transportation policy, whether the application is one for common or contract carrier authority." (p. 707)

Thereupon, appellee filed its complaint on August 21, 1959, in the United States District Court for the Western District of Missouri, attacking the validity of the Commission orders of January 31, 1958, and of June 15, 1959. The Regular Common Carrier Conference, the Irregular-Route Common Carrier Conference, as well as U.S.A.C. were permitted to participate in the lower court proceeding as intervening defendants. On August 9, 1960, the lower court issued its decision, 185 F. Supp. 838, *supra*, setting aside the assailed orders of the Interstate Commerce Commission, declaring them unlawful and void, and remanding the case to the Commission for further proceedings consistent with the court's rulings. Thereafter, the Interstate Commerce Commission and the joint appellants herein filed their respective notices of appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding is a case of first impression, interpreting important amendments enacted in 1957 to the Interstate Commerce Act. Those amendments were foreshadowed by the decision of this Court in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, where the Court said that "A contract carrier is free to aggressively search for new business within the limits of its license".

The Interstate Commerce Commission proposed legislation[2] which, *inter alia*, would amend the definition of "contract carrier" and authorize the Commission to limit the number of patrons a contract carrier might serve. Numerous witnesses were heard on the bill, S. 1384, as introduced in the Senate, and a report[3] was issued thereon concluding in these words:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

This Court is now asked to review an interpretation of the subject amendments in question. We respectfully suggest that the decision below is not in harmony with the opinion of the Senate Committee expressed in the language quoted just above.

1. The first question to be considered is whether the Interstate Commerce Commission is now required by law to grant to a motor contract carrier applicant

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[2] I.C.C. 70th Annual Report, P. 162, (1956).

[3] S. Rep. 703, 85th Congress, 1st Session (1957).

therefor a permit regardless of the existence of motor common carriers able and willing to provide the considered service. It is imperative that this view of the law be reviewed, for, unless it be reviewed and reversed, it will mean that contract carrier applicants, almost as a matter of course, will be entitled to permits in circumstances, such as here present, where the Commission has already authorized common carriers to provide the identical service. The traffic loss to the presently certificated carriers would be irreparable.

Nowhere in the legislative history of the 1957 amendments to the contract carrier provisions of Part II of the Interstate Commerce Act can there be found language supporting the conclusion of the lower court on the question at hand. The Senate Committee, reporting on S. 1384 related testimony showing that already in-roads upon common carriage had been made by unlimited contract carriage and that the Committee undertook to correct that situation. (Senate Report 703, *supra*, pp. 4, 7 (1957)). Can it be that the Senate Committee, and Congress, sought to protect common carriage against the competition of unlimited contract carriage and, by the same measure, intended to destroy the result so clearly expressed? At no time during the deliberations before Congress, and at no place in either House[4] or Senate Committee Reports, was there language which would exclude consideration of the service of existing common carriers when the question of a grant to a contract applicant was before the Commission.

The grant of new operating authority, or its denial, calls for a realistic valuation of demonstrated facts.

[4] H.R. Rep. 970, 85th Congress, 1st Sess. (1957).

Obviously no grant of either common or contract rights can be justified if there is no need for the service. In effect, convincing evidence of need for a contract carrier specialized service usually demonstrates concurrently that existing common carriers do not meet, or are not in position to meet, the shipper's requirements. If, as the court below seems to hold, the existence of adequate common carrier service is immaterial, the Commission would be obliged to license a contract carrier even though no need for its service had been shown to exist. The very statement of the concept prompts question of its validity.

That the Commission is compelled by the statute to consider the effect upon existing carriers is seen in the language of Section 209(b), *supra*, which requires that "the Commission 'consider . . . the effect which granting the permit would have upon the services . . . the protesting carriers . . .' ". That effect, as hereinafter developed, may be adverse even where there is no actual diversion of traffic presently carried.

It becomes manifest that a challenge—indeed, a denial—of the Commission's right to observe the specific injunction of the statute should be reviewed.

2. The opinion of the court below is clearly to the effect that the Commission may not give weight to evidence that a certificated, operating carrier is able and willing to furnish a shipper's transportation needs. And going further in the same vein the court, in construing the language of Section 209(b) that the Commission must consider "the effect which granting the permit would have upon the services of the protesting carriers", holds that the "effect" to be considered is only the effect upon traffic actually

enjoyed and physically moved. In that view the availability, willingness, ability—indeed, the eagerness—of a presently existing common carrier may not be considered.

An important new principle in transport regulation, it appears, would thus be created. Hereafter, when a *common carrier applicant* seeks authority, the Commission could still consider the effect upon existing common carriage. On the other hand, when a *contract carrier applicant* seeks authority, the Commission is proscribed from considering the effect upon existing common carriage.

For companies such as appellant U.S.A.C. the situation is starkly realistic. U.S.A.C. specializes in the transportation of aircraft parts, particularly parts for military aircraft. Since military aircraft are especially subject to obsolescence, it is evident that potential traffic is peculiarly important to the aircraft parts transporter. If consideration of the effect of a grant of a contract-carrier application upon protesting carriers is limited to the effect upon the services of carriers actually participating in the involved traffic, all new aircraft parts traffic would be siphoned off by contract carriers, such as J-T, on the ground that presently authorized carriers, such as U.S.A.C., would not be adversely affected by any diversion of traffic. Under this line of reasoning, specialized motor common carriers, such as U.S.A.C., would soon be relegated to the handling of small volumes of residual traffic, and the less desirable traffic not wanted by contract carriers. The resultant effect upon an aircraft parts carrier would scarcely be the production of that economic stability which is one of the announced goals of the National Transportation

Policy. And what is true peculiarly of U.S.A.C. is true likewise of any common carrier.

If the Commission in summary fashion granted all contract carrier applications without considering the effect upon existing carriers, the granting of such permits would be an automatic removal of actual *and potential* traffic from the entire common carrier system. As the Commission said in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748, 752-753 (1953):

> "A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service." (Aff'd.—*Smith & Solomon Trucking Co.* v. *U. S.*, 120 F. Supp. 277 (1954)).

Potential traffic is as important as presently enjoyed traffic if the common carrier industry is to survive. Modern industry portrays a continually changing picture. Plants and locations of commercial houses are moved frequently; old products are constantly supplanted by new lines. A fluid traffic pattern results. The instant traffic involves a part for the B-52 airplane. But what is the plane now in construction? The part or accessory in developmental stage? If, in showing adverse effect, a protesting carrier is required to show diversion of actual traffic moved, strangulation of present carriers will have been the gift of the 1957 amendments.

3. On the question of applicant's burden of proof the Court below stated:

"The Commission goes beyond the language and scope of the statute when it assumes and requires:

> (a) That applicant carries the burden of showing that existing services are inadequate; . . ."

It is urged that the Court erred in reaching the foregoing conclusion.

What the Commission actually stated respecting applicant's burden is most persuasive:

> "Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary, the very business of U.S.A.C. is the transportation of the type of traffic involved." (79 M.C.C. 695, 708-709.)

Thus it is seen that the Commission has expected protesting carriers to come forward—as did U.S.A.C. here—and demonstrate their ability to provide an adequate service for the subject transportation.

Appellants take the position that the statute has not placed upon a contract carrier applicant the burden of proving directly the inadequacy of existing service by presenting detailed knowledge of a protestant's operations. Rather, the burden is upon protestants

to present such evidence. However, in order to determine existence of a need for service which would justify a grant of new or extended authority the Commission assuredly may look to any probative evidence of record, whether by applicant, by applicant's shipper witness, or by protestants, to reach its conclusion.

So important is the adequacy of existing service as a factor in the grant of authority under the 1957 amendments that the duty to present evidence of such service, and the limitations upon the Commission in this respect, should be passed upon.

4. The court below concluded that the five factors set forth in Section 209(b) are exclusive and that the Commission is not allowed to consider any other factors in deciding whether to issue a permit to one seeking new or additional operating authority. We find nothing in the 1957 amendments themselves requiring this restrictive treatment of evidence and nothing in their legislative history to support this result.

Among the tests applied by the Commission since the beginning of motor carrier regulation to determine whether a permit should be granted is the adequacy-of-existing-service-test. *C. & D. Oil Co. Contract Carrier Application,* 1 M.C.C. 329, 332 (1936). Congress may be presumed to have been aware of the application of this test when, in 1957, the subject legislation was before it. However, it took no step to modify it, or to exclude it. Moreover, since the National Transportation Policy requires that the Interstate Commerce Act be administered so as to provide "adequate, economical and efficient service",

the adequacy test is not merely justified, but required. Efficiency and economy are not enhanced by the unnecessary duplication of services.

The record of the hearings before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce discloses evidence that the amendments to Section 209(b) of the Act as proposed by the Contract Carrier Conference of The American Trucking Associations and adopted by Congress would not make it easier for contract carriers to obtain new authority except where the proposed service is purely a substitute for private carriage. That was the representation made to the Congress by the Spokesman of that Conference.[5] The Conference now represents to the courts that the amendment as adopted by the Congress and enacted into law facilitates obtaining a grant of new or additional authority by a contract carrier applicant notwithstanding existing common carrier service.

It is proper here to note that in addition to the criteria enumerated in Section 209(b) (49 U.S.C. 309(b)) there are the specific requirements in that section that an applicant be shown to be "fit, willing and able" to perform the proposed service. Besides, since, in Section 209(b), Congress made specific reference to consistency with the public interest, and to observance of the National Transportation Policy as objectives to be met in passing upon a contract carrier grant, there is no reason to believe that every element comprising those broad objectives is omitted

[5] 1957 Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Congress, 1st Session, volume entitled "Surface Transportation—Scope of Authority of ICC", at 300, 304.

simply because not enumerated in specific language. It is inconceivable that fitness, willingness and ability are no longer criteria, nor that the broad range of the Commission's discretion under the National Transportation Policy has been contracted by the 1957 amendments here in question.

CONCLUSION

The questions presented by this appeal are substantial and of such public importance as to require plenary consideration, with briefs and oral argument for their resolution.

Respectfully submitted,

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Attorneys for Appellants

December 5, 1960

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for appellants U.S.A.C. Transport, Inc., Common Carrier Conference —Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of December, 1960, I served copies of the foregoing Jurisdictional Statement on the several parties as follows:

1. On the United States, by mailing copies, duly addressed and postage prepaid, to Hon. J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., and Edward L. Scheufler, United States Attorney, Kansas City, Missouri, air mail postage prepaid.

2. On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, and by delivering a copy to James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, at their offices in Washington, D. C.

3. On the J-T Transport Company, Inc., appellee herein, by mailing copies in duly addressed envelopes, air mail postage prepaid, to James W. Wrape, Esq., and Glenn M. Elliott, Esq., Wrape and Hernly, 2111 Sterick Building, Memphis, Tennessee, and to John E. Park, Esq., 1007 Bryant Building, Kansas City, Missouri, its attorneys.

4. On other appellees herein, by mailing copies in duly addressed envelopes, to their respective attorneys of record, as follows:

With first class postage prepaid, to Clarence D. Todd, Esq., and Charles F. Riddle, Esq., 1825 Jefferson Place, N.W., Washington 6, D. C., and with air mail postage prepaid, to Lowell L. Knipmeyer, Esq., Waltower Building, Kansas City 6, Missouri, Attorneys for Contract Carrier Conference of American Trucking Associations, Inc.

With air mail postage prepaid, to John H. Kreamer, Esq., 1007 Bryant Building, Kansas City, Missouri, Attorney for Aerospace Industries Association of America, Inc.

.....

ROLAND RICE

APPENDIX A

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 12497

Filed August 9, 1960

J. C. TRUMAN, *Clerk*
By ARLIE G. GROUT, *Deputy*

J-T TRANSPORT COMPANY, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before JOHNSEN and MATTHES, *Circuit Judges*, and SMITH, *District Judge*.

This opinion prepared by Judge Smith and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

/s/ HARVEY M. JOHNSEN
Circuit Judge

/s/ M. C. MATTHES
Circuit Judge

/s/ R. JASPER SMITH
District Judge

APPENDIX B

National Transportation Policy

"[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transporation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

DEFINITIONS

Section 203(a)(15) of the Interstate Commerce Act

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor

vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

Section 209(b) of the Interstate Commerce Act

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance,

and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requiremnts established by the Commission under section 204 (a) (2) and (6): *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions, or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso."

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Nos. ~~500~~ 17 and ~~501~~ 18

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL.

U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS

v.

J-T TRANSPORT COMPANY, INC., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 563

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL.

No. 564

U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS

v.

J-T TRANSPORT COMPANY, INC., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES

The above appeals are from the judgment of a three-judge district court setting aside orders of the Interstate Commerce Commission which denied a permit to a motor carrier to engage in contract carriage operations. In the district court, the United States supported the Commission's orders, but it decided, on further analysis of the facts and issues, not to appeal from the district court's adverse judgment. The Gov-

ernment nevertheless believes that the appeals present issues of public importance, upon which this Court has not passed, involving the proper construction of certain 1957 amendments to the Interstate Commerce Act. In our view, therefore, the Court should note probable jurisdiction of the appeals.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

On Appeals From the United States District Court for the Western District of Missouri—Western Division

---

MOTION TO AFFIRM

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January 5, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 563

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

No. 564

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

On Appeals From the United States District Court for the Western District of Missouri—Western Division

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Contract Carrier Conference of American Trucking Associations, Inc., an appellee in the above entitled case, moves that the final judgment and decree of the District Court be affirmed on the ground

that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered August 9, 1960, by a District Court of three judges specially constituted pursuant to 28 U.S.C. 2284 and 2325, setting aside certain orders of the Interstate Commerce Commission as being unlawful and void.

The case arises from an application filed March 14, 1957 by J-T Transport Company, Inc. (J-T), its Docket No. MC-11185 (Sub No. 102), in which the carrier sought a permit authorizing operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans. The application was the subject of a hearing before a duly appointed hearing examiner of the Commission, who recommended that the application be granted. However, by a report decided January 31, 1958, and reported at 74 M.C.C. 324, the Commission, Division 1, denied the application. Petitions for reconsideration and for oral argument were filed by the applicant. The Contract Carrier Conference of American Trucking Associations, Inc., filed a petition for leave to intervene, and for reconsideration or further hearing. The Conference was permitted to intervene, as were certain other conferences of American Trucking Associations, Inc. However, all petitions for reconsideration, oral argument, or further hearing were denied. At this point J-T filed a complaint in the United States District Court for the Western District of Missouri asking that the Commission's order be set aside. Before the cause came on to be heard, the Commission issued a report in another contract carrier case which appeared to be in conflict with its denial of the authority sought by J-T. J-T then decided to again seek reconsideration of its case

before the Commission and was permitted to take a voluntary nonsuit, without prejudice, in its first complaint. The Commission, as a result of the second petition, did reopen the proceeding for reconsideration, but by its report and order of June 15, 1959, denied the application. The Commission's denial of the application was based on the mere existence and availability of a common carrier allegedly willing and able to provide the service sought, although it had not been handling the traffic involved. As a result of this denial, J-T brought this action to determine the validity of the Commission's orders. The decision of the District Court setting aside the Commission's orders is reported at 185 F. Supp. 838.

ARGUMENT

The decision of the District Court is plainly correct and should be affirmed.

The first issue raised by appellants is whether and to what extent the Commission may consider the existence of common carriers who profess to be able and willing to provide the type of service for which a need has been shown. In 1957 certain amendments were made to the Interstate Commerce Act. Prior to these amendments Section 209(b) of that Act authorized the issuance of a permit to a contract carrier upon a finding that the proposed operation would be consistent with the public interest and the national transportation policy. The 1957 amendments added the following language:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

The Commission had initially proposed that Section 209(b) be amended to provide that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."[1] This proposal encountered the opposition not only of the contract carriers and their shippers, but also of the Department of Justice and the Department of Commerce. This opposition was expressed in the form of a letter to Senator Magnuson from the Honorable William P. Rogers, then Deputy Attorney General, and through the testimony of the Honorable Louis S. Rothschild, Under Secretary for Transportation, Department of Commerce. It appears as a part of the record of the 1957 hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., entitled *Surface Transportation—Scope of Authority of I.C.C.* (pp. 11, 200-203). The Commission itself finally agreed to deletion of the disputed language on the stated ground that it would impose a very difficult burden of proof on applicants. Congress therefore rejected this language and instead set up the previously quoted criteria for determining under what circumstances issuance of a contract carrier permit would be consistent with the public interest and the national transportation policy.

In its first assignment of error the Commission adopts as a premise that the District Court held that Congress intended to require the Commission to grant a motor contract carrier permit "without regard" to the fact that existing motor common carriers are able and willing to provide adequate service to the shipper. The Commission's argument relative to this assignment, does not in fact support the assignment of error, but rather deals with certain

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[1] This was not a new proposal by the Commission. It was first recommended to Congress in the 69th Annual Report of The Interstate Commerce Commission (1955) pp. 132-133, and repeated in the Commission's 70th Annual Report (1956) pp. 162, 163.

aspects of the burden of proof. More important, however, the District Court's holding is not as broad as the Commission appears to believe. The Court did not hold that a contract carrier permit should be issued "without regard" to existing services. Rather it held that the mere existence or availability of common carrier service was not controlling, and that it was necessary to determine what effect, if any, granting a permit would have on the existing services of those carriers. Stated accurately, the question should be "Did the Court err in holding that by the 1957 amendments to the Act, Congress intended the Commission to consider the possible adverse effect which the granting of a permit would have on the services of existing carriers, rather than to base its decision on a mere determination that existing common carriers are able and willing to provide the service. So stated, this question must be answered in the negative. The legislative history discloses a rejection of the "able and willing" test, and the language of the statute itself makes the controlling criterion here the effect of the granting of a permit on the services of existing carriers. The District Court clearly perceived this and committed no error.

Appellants also misconceive the nature of the District Court's holding in their second assignment of error. The Court did not hold that a determination of the effect which granting a permit would have on the services of protesting carriers relates only to diversion of traffic from a carrier presently serving the affected shipper, and excludes consideration of the loss of potential traffic. What the Court did find was that the Commission erred in basing its decision on the *presumption* that if an existing common carrier is able and willing to perform services for the shipper, the effect on existing common carrier services is adverse. The Court points out that an adverse effect of granting the application on the services of protesting carriers would normally come about from diversion of traffic which the carrier was actually handling; and that

where the protesting carrier is not participating in the traffic, there can be no diversion and hence "ordinarily" there would be no adverse effect on the carrier's service. The Court does not say that under *no* circumstances could there be an adverse effect from the loss of potential traffic nor does it completely rule out a consideration of this factor. What the Court does say is that *ordinarily* there will be no adverse effect on the services of protesting carriers through loss of potential traffic, and that the Commission is in error in establishing a presumption to the contrary.[2] In aiding itself by this presumption the Commission, in effect, injects precisely the standard which was deleted by Congress, and this was recognized by the District Court.

Appellants pose as their third question whether the Court erred in concluding that the Commission had placed upon applicant the burden of proving the services of existing carriers inadequate. This precise point is never developed, though the contention appears to be that the Commission should be allowed to consider the adequacy of existing common carrier service. This appears to be an outgrowth of the position taken by the Commission before the District Court. There, it apparently conceded that it could no longer deny a contract carrier application upon the ground that applicant has failed to sustain the burden of proving that common carriers are "unwilling or unable" to perform the proposed service, but contended that it is proper to consider the "adequacy of existing services". There is, however, no practical distinction between these tests.

In order for a carrier's service to be adequate, the carrier must first be willing to handle the traffic. In addi-

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[2] In this connection the District Court stated that "there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question." (Emphasis is the District Court's).

tion, however, it must also be *able* to handle the traffic to the satisfaction of the shipper. If a carrier is *willing* to handle the traffic, and is *able* to handle it in such a way as to satisfy the shipper's requirements, then its service may be said to be adequate. Conversely, if a carrier is unwilling to handle the traffic, or is unable to handle it in such a way as to satisfy the shipper's requirements, then obviously its service is inadequate. Adequacy, as used by the Commission, is a term embracing either willingness or ability or both. Over the years, the Commission has used these terms interchangeably, as is illustrated by the decisions reviewed and discussed in the District Court's opinion. The Court concluded, correctly we believe, that there was no practical distinction between the tests; and that to the extent applicant had been required to show the protesting common carriers were unable or unwilling to meet the shipper's requirements the standard was not supported by the language of Section 209(b) whether under the guise of an "adequacy" test or otherwise.

The Commission now suggests that adequacy of service is pertinent in determining the effect of a denial upon the shipper—a factor which the Commission must consider. However, as the District Court points out, this provision quite obviously was inserted to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. This criterion cannot be used as a means of distorting or evading the expressed statutory considerations.

In the 1957 amendments to Section 209(b) of the Interstate Commerce Act, Congress specifically directed the Commission to consider 5 factors in determining whether or not issuance of a permit would be consistent with the public interest and the national transportation policy. Prior to that time the Commission had no statutory standards to guide it in making this ultimate determination.

Lacking any such guides, the Commission had developed certain policies, or at least attitudes, aimed at restricting the issuance of new contract carrier permits. The Commission felt that this was necessary because it could not limit the number of shippers which a contract carrier could serve and hence could not control the activities of these carriers once they secured a permit. During this period, the willingness and ability, or adequacy test was developed. However, the 1957 amendments did give the Commission power to limit the services of contract carriers to a particular shipper, and the Commission now regularly does so. Since a contract carrier was thereby effectively precluded from expanding its activities to the point of serving the general public, the Commission's prior reasoning became inappropriate and other guides were needed. Congress recognized this by enumerating the standards presently found in Section 209(b). In commenting on this on the floor of the Senate, Senator Smathers, Chairman of the Subcommittee which conducted the hearings on the proposed legislation stated, 103 Cong. Rec. 14035-36 (1957):

> "This section [209 (b)] is also amended by adding a new sentence providing that hereafter the Commission, in passing upon new permits, shall consider the number of shippers to be served, the nature of the service proposed, the effect which granting the permit would have upon protesting carriers and the effect which denying it would have upon the applicant and its shipper. In this, *the Committee is proposing to give the Commission more helpful standards than are contained in the present law.*" (Emphasis added.)

The language of the statute directs the Commission to consider 5 factors and only 5 factors. Had Congress intended other factors to be considered, it undoubtedly would have so specified, and in interpreting the statute, the principle of inclusio unius est exclusio alterius should apply. As was stated in *Knapp-Monarch Co.* v. *Commis-*

sioner of Internal Revenue, 139 F. 2d 863, 864 (8th Cir. 1944):

> "The very fact that Congress has provided a way in which the Internal Revenue Department may bind itself, precludes the possibility of its being bound by some other procedure. 'When a statute limits a thing to be done in a particular mode it includes the negative of any other mode. *Raleigh, etc. R. Co.* v. *Reid*, 13 Wall. 269, 270, 20 L. Ed. 570; *Scott* v. *Ford*, 52 Or. 288, 296, 97 P. 99.' *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 49 S. Ct. 129, 132. See also *McIlhenny, et al.* v. *Commissioner*, 3 Cir., 39 F. 2d 356."

To the same effect is *Lukens Steel Co.* v. *Perkins*, 107 F. 2d 627 (D. C. Cir. 1939), *rev'd on other grounds*, 310 U.S. 113, 60 S. Ct. 869 (1940), where the Court of Appeals stated (107 F. 2d 640):

> "A statute, by prescribing the conditions and limitations which properly may be imposed upon one who seeks to enjoy a right, prohibits the denial of the right upon other grounds."

Thus it is our position that the Commission is confined to consideration of the five criteria set forth in Section 209 (b) of the Act. This does not mean, as certain appellants suggest, that the Commission cannot consider an applicant's fitness, willingness or ability, for, under the specific language of Section 209 (b), applicant must appear to be fit, willing and able properly to perform the proposed service. The five specified criteria apply in determining whether issuance of a permit will be consistent with the public interest and the national transportation policy. Actually, these criteria include the very factors which the Commission would normally want to consider in a contract carrier application, and the Commission acquiesced in their adoption by Congress. As the Court below found, the criteria are broad and inclusive, and when given proper application, in the light of the evidence, the Commission

should, without the injection of other factors, be able to make a proper disposition of the application. The Court has correctly interpreted the statute, and given the Commission sufficient guide as to the scope of its permissible action.

The 1957 amendments to the Interstate Commerce Act actually grew out of this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 76 S. Ct. 461 (1956). Since this decision was not in accord with the Commission's prior thinking, it suggested certain legislative measures to Congress. The Commission's proposals were not altogether acceptable, and the legislation as finally adopted represents a compromise of sometimes conflicting views. The purpose of the amendments was to supply a more positive statutory guide to the Commission than then existed, and to make readily possible clearer distinctions as between motor common and contract carriers. See Sen. Rep. No. 703, 85th Cong., 1st Sess., p. 3 (1957). To this end, the definition of contract carriage was changed by amending Section 203 (a) (15) of the Act. Amendments to Section 209 (b) gave the Commission power to limit contract carrier service to a specific shipper, and set up the criteria here under consideration. Rejected by Congress was the proposal that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

Although the legislation involved is important, the questions presented are not so substantial as to warrant further consideration by this Court. In amending the Act Congress expressed itself clearly and set forth definite and reasonably precise guides for the Commission. Instead of following these guides, the Commission has attempted to interject other tests into the determination of contract carrier applications—tests nowhere authorized by statute nor supported by legislative history, and in fact rejected by Con-

gress. The District Court has recognized this fact. It has interpreted the relevant portions of the statute involved in accordance with well established principles of statutory construction. In our opinion no novel or unusual questions are presented to this Court, such as would require further oral argument.

We respectfully submit therefore, that the decision below is correct, and that appellants present no substantial question for the decision of this Court. The judgment and decree of the District Court should accordingly be affirmed.

Respectfully submitted,

CLARENCE D. TODD
1825 Jefferson Place, N. W.
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1825 Jefferson Place, N. W.
Washington 6, D. C.
and
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Chicago 2, Ill.

January 5, 1960

Certificate of Service

I, Clarence D. Todd, one of the attorneys for appellee Contract Carrier Conference of American Trucking Associations, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of January, 1961, I served copies of the foregoing Motion to Affirm on the several parties as follows:

1. On the United States by mailing copies in duly addressed envelopes with first class postage prepaid to Hon. J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C. and to Edward L. Scheufler, United States Attorney, Kansas City, Mo., with air mail postage prepaid.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first class postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On other appellants herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

To Roland Rice, Esq., 618 Perpetual Building, 1111 E Street, N.W., Washington 4, D. C., Attorney for Regular Common Carrier Conference of American Trucking Associations, Inc.

To James E. Wilson, Esq., 716 Perpetual Building, 1111 E Street, N.W., Washington 4, D. C., Attorney for Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc.

To Paul F. Sullivan, Esq., 1821 Jefferson Place, N.W., Washington 6, D. C., Attorney for U.S.A.C. Transport, Inc.

4. On J-T Transport Company, Inc., appellee herein, by mailing copies in duly addressed envelopes, with air mail postage prepaid to James W. Wrape, Esq., and Glenn M. Elliott, Esq., Wrape and Hernly, 2111 Sterick Building, Memphis, Tenn., and to John E. Park, Esq., 1007 Bryant Building, Kansas City, Missouri, its attorneys.

5. On Aerospace Industries Association of America, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid to John H. Kreamer, Esq., 1007 Bryant Building, Kansas City, Missouri, its attorney.

CLARENCE D. TODD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

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J-T TRANSPORT COMPANY, INC., ET AL.

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL.

On Appeals From the United States District Court for the Western District of Missouri

MOTION OF J-T TRANSPORT COMPANY, INC. TO DISMISS OR AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 563 and 564

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL.

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL.

On Appeals From the United States District Court for the Western District of Missouri

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MOTION OF J-T TRANSPORT COMPANY, INC. TO DISMISS OR AFFIRM

Comes J-T Transport Company, Inc., appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, and respectfully moves the court to dismiss the appeals herein or, in the alternative, to affirm the judgment of the lower court upon the following grounds:

1. It is manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

2. Appellants here seek, as they did before the court below, to have the court by judicial legislation invest the Interstate Commerce Commission with power denied to it by Congress, and to permit the Commission to do indirectly that which it cannot do directly under statutory authority.

3. It is obvious that appellants, in posing their alleged "Questions Presented", stretch the implications of the decision below to unjustified reaches, thereby resorting to the familiar expedient of setting up straw men solely for the purpose of knocking them down.

4. The only question presented is whether the Commission may deny an application for a contract motor carrier permit solely by virtue of adding to the five tests set forth in sec. 209(b) of the Interstate Commerce Act, 49 U.S.C. sec. 309(b), a sixth test, i.e., that an applicant must assume and carry the burden of establishing that a motor common carrier, as a *common carrier,* was unwilling or unable to perform the included transportation as a common carrier. The Congress in 1957 denied the Commission authority to impose such sixth test, and the lower court correctly so held. No other question is presented. Review of the legislative history of the amendments of 1957 to sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. secs. 303(a)(15) and 309(b), establishes that no further argument is necessary.

STATEMENT OF THE CASE

This action was instituted in the United States District Court for the Western District of Missouri to enjoin, annul and set aside orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, and to compel action by the Commission unlawfully withheld upon the application of J-T Transport Company, Inc., hereinafter referred to as J-T, for a permit to operate, as a contract carrier by motor vehicle, over irregular routes, of unerated landing gear bulkheads requiring special handling and equipment because of their fragile nature, from Indianapolis, Indiana, to Wichita, Kansas. Such application was filed by J-T with the Commission on March 14, 1957, and assigned docket No. MC-11185, Sub 102.

J-T for a number of years has been engaged, pursuant to authority of the Commission, in the transportation, as a contract carrier by motor vehicle, over irregular routes, of unerated airplane parts and equipment requiring special handling and equipment, between a number of points in the west and midwest, and in so doing has conducted a very substantial operation and made material contribution to the National Defense effort in providing a highly specialized motor carrier service to manufacturers of aircraft for the United States government, tailored to meet the distinct transportation needs of such manufacturers.

On August 5, 1957, upon application of J-T and with the support of Boeing Airplane Company, the Commission, after full investigation and a finding that there was an immediate and urgent need for the service proposed by J-T, and that there was no carrier service capable of meeting such need, pursuant to

authority in it vested by sec. 210a(a) of the Interstate Commerce Act, hereinafter referred to as the Act (49 U.S.C. 310a(a)), granted to J-T temporary authority to perform the transportation for which permanent authority was sought, and from such time plaintiff has been and is engaged in performing a needed and satisfactory transportation service for Boeing Airplane Company in transporting landing gear bulkheads from the point of manufacture in Indianapolis to the plant of Boeing in Wichita, where they are delivered on such timed schedule as to permit them to be incorporated in aircraft being produced for the United States government on a production-line basis.

The application of J-T for permanent authority was duly heard by an experienced examiner of the Commission on May 22, 1957. At that time affected railroads, a number of motor common carriers designated as "heavy haulers", and one specialized motor common carrier intervened in opposition. Following the undisputed evidence with respect to the type of commodity to be transported and the highly specialized transportation service required by the shipper the "heavy haulers" did not persist in their opposition. The objection of the railroads was to the original commodity description, which objection was satisfied by amendment thereof, as appears of record.

It results, therefore, that the only motor carrier opposing plaintiff's application is U.S.A.C. Transport, Inc., one of the appellants, a motor *common carrier*, which holds authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character. Under such authority this car-

rier proposes, as a *common carrier*, and within the limitation of its tariff restrictions as to dedication of equipment to the exclusive use of the shipper, and by providing the necessary special equipment, to perform the transportation as a *common carrier* which J-T proposes to perform as a contract carrier, but such common carrier has never participated in performing the involved transportation, and the record does not establish that, irrespective of the outcome of this litigation, the shipper would ever entrust to the common carrier the handling of its fragile and expensive commodities. The record does establish that the motor common carrier service of U.S.A.C. Transport, Inc. would not meet the transportation needs of the shipper.

On July 18, 1957, the examiner filed his recommended report and order wherein he found that the operation proposed by J-T would be consistent with the public interest and the National Transportation Policy as enunciated by Congress (49 U.S.C., preceding secs. 1, 301, 901, and 1001), and that a permit authorizing such operation should be granted. The examiner incorporated in his report a comprehensive and carefully prepared statement of facts which statement, in that same was subsequently adopted by the Commission, is entitled to careful consideration. It is attached as Appendix "A" hereto.

Exceptions to the examiner's recommended report and order were duly filed by U.S.A.C. Transport, Inc., and answered by J-T. On January 31, 1958, Division 1 of the Commission handed down a report and order embodying in one report its action on two separate applications heard on separate records. Such report is published in 74 M.C.C. 324, and a copy thereof is

attached as Appendix "C" to the jurisdictional statement filed herein by the Commission. It should be noted that we are here concerned with only the Sub 102 application referred to in such report. The effect of the Division 1 report was to deny to J-T authority to perform the involved transportation *as a contract carrier* solely because one *common carrier held authority* to perform the transportation as such, which carrier had never performed any such transportation, but merely expressed a willingness so to do as a *common carrier*.

Petitions for reconsideration were filed by J-T, the Contract Carrier Conference of American Trucking Associations, Inc., and the Aircraft Industries Association of America, Inc., the latter having intervened in support of the application, to which petitions the motor common carrier responded, and on July 25, 1958, the Commission overruled all petitions for reconsideration.

Thereby J-T having exhausted its administrative remedies, on August 18, 1958 it filed an action in the United States District Court for the Western District of Missouri against the Interstate Commerce Commission and United States of America, being Civil Action No. 12010, challenging validity of the orders of the Commission upon the grounds that same were unreasonable, arbitrary, capricious, unlawful, in abuse of discretion, in excess of statutory authority and short of statutory right for the various reasons assigned in the complaint. Injunctive relief was prayed, and it was prayed that judgment and decree be entered setting aside said orders of the Commission, declaring same unlawful and void, and ordering and directing the Commission to issue to plaintiff a permit author-

izing it, as a contract carrier, to perform the transportation for which a need had been shown.

Subsequently, and before the filing of answer on behalf of either the United States of America or the Commission, Division 1 of the Commission handed down a report in another proceeding (*Application of William Edward Leary,* No. MC-39966, Sub No. 5, published 74 M.C.C. 361), which, upon the face thereof, appeared to be diametrically opposed in material respects to the order of the Commission in the case at bar of date January 31, 1958, published in 74 M.C.C. 324. J-T was advised, informally, that the Commission would accept another petition for reconsideration should same be tendered, whereupon J-T did tender to the Commission another petition for reconsideration which the Commission, by order of date October 16, 1958, accepted for filing, vacating its previous order of July 25, 1958, and reopening the proceeding for reconsideration on the then present record and issuance of further report and order. Having every reason to believe that by virtue of its conclusion to reconsider the Commission contemplated granting to J-T the permit to which it was entitled, by agreement of the parties and order was entered in cause No. 12010 in the United States District Court for the Western District of Missouri permitting plaintiff to take a voluntary non-suit without prejudice. Subsequent developments, however, indicate that J-T was led down the "primrose path". The Commission held the matter under advisement from October 16, 1958 to June 15, 1959, during which time it expanded and extended its decision of January 31, 1958, which initially had consisted of seven printed pages, disposing of two applications, as reflected by Appendix "C" to

the jurisdictional statement of the Commission filed herein, to a document of 28 printed pages, attached as Appendix "D" to the jurisdictional statement filed herein by the Interstate Commerce Commission. It is published in 79 M.C.C. at p. 695 et seq.

It was the impression of J-T in the court below, and the charge was made with obvious record foundation, that the report of the Commission of date June 15, 1959, *supra,* was nothing more nor less than an extended brief and argument in support of and in an effort to cure apparent defects in the report of January 31, 1958, 74 M.C.C. 324. It is significant that in neither of the jurisdictional statements filed by the respective appellants is any reference made to cause No. 12010 filed in the United States District Court for the Western District of Missouri, nor the circumstances under which dismissal thereof by J-T, without prejudice, was obtained.

With the handing down of the Commission's order of June 15, 1959, 79 M.C.C. 695, J-T Transport Company, Inc., having again exhausted its administrative remedies, filed the action here involved in the United States District Court for the Western District of Missouri, Western Division and, in due course, same was heard before a three-judge court consisting of Circuit Judges Johnson and Matthes, and District Judge Smith. The opinion of the court below is published in 185 F. Supp. 838 et seq., and is attached as Appendix "A" to the jurisdictional statement filed herein by the Interstate Commerce Commission.

It should be noted that in the proceeding before the United States District Court the Contract Carrier Conference of American Trucking Associations and

Aerospace Industries Association intervened in support of J-T and that U.S.A.C. Transport, Inc. and the Regular and Irregular Common Carrier Conferences of American Trucking Associations, Inc. intervened in opposition.

The United States of America answered, filed a brief and presented oral argument in the court below, but, as appears from the "Memorandum for the United States" filed in this court the United States has decided ". . . on further analysis of the facts and issues, not to appeal from the district court's adverse judgment."

In this connection it should be noted that in another cause, subsequently heard, in the United States District Court for the Western District of Arkansas, being Civil Action File No. 1531, styled *Elvin L. Reddish* v. *United States of America, Interstate Commerce Commission et al.*, wherein substantially identical legal principles were involved, the United States filed an answer essentially admitting all material allegations of the complaint, and by brief and argument supported the position of plaintiff in that cause. The opinion of the three-judge court, consisting of Circuit Judge Matthes and District Judges Miller and Young has not been published as of this date, but copy of the opinion of such court is attached as Appendix "B".

It is further of significance that the Interstate Commerce Commission, in the light of the unanimous and consistent opinions of the lower courts, has now itself apparently become convinced that in passing on applications for contract carrier permits it cannot impose its "sixth test", and that it must consider such appli-

cations solely in the light of the five tests afforded to it by Congress in the 1957 amendments to sec. 209(b) of the Act. In this connection, the most recent decision of the Commission to come to our attention is that in No. MC-117568, *TAM Fertilizer Carriers, Inc.—Contract Carrier Application,* in which the Commission's order on reconsideration was dated December 7, 1960, served December 19, 1960. The report of the Commission on reconsideration has not yet been published, and for the convenience of the court we attach copy thereof hereto as Appendix "C". There the applicant proposed to perform a contract carrier service by motor vehicle, serving three shippers, in the transportation of fertilizer, fertilizer materials and compounds; the application was opposed by a number of motor common carriers who had authority to perform the involved transportation, as well as by a number of rail carriers. It is interesting to note that the Commission, at sheet 7 of its report, contra to the position which it assumes in its jurisdictional statement in the case at bar, states:

> The evidence discloses that applicant, while it will dedicate its equipment to the exclusive use of the three supporting shippers rather than to that of each shipper, will provide a service meeting the distinct needs of these shippers. Thus, it appears that applicant's proposed operations are those of a contract carrier as defined in sec. 203(a)(15) of the Interstate Commerce Act, as amended. However, an applicant for authority as a contract carrier is entitled to a grant of authority only upon our finding that its proposed operations will be consistent with the public interest and the National Transportation Policy. In making such a determination, we are required to give consideration to, among other things, the following

> factors enumerated in sec. 209(b) of the Act, as amended: (1) the number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of the grant of authority on the services of protesting carriers, (4) the effect of a denial on applicant and its shippers, and (5) the changing character of the shipper's requirements."

It is respectfully presented that the Commission has *now recognized,* subsequent to the filing of its notice of appeal and jurisdictional statement herein, that it is bound, in passing upon applications for contract carrier permits, by the precise and specific criteria enunciated by the court below in its opinion in 185 F. Supp. 838, as well as sections 203(a)(15) and 209(b) of the Act as amended and that perforce it is manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument. It is, therefore, submitted that the motion of J-T Transport Company, Inc. to dismiss or affirm should be sustained.

Our statements *supra* are not to be construed as intimating that we do not consider the questions here involved to be of importance. They are of the utmost importance. The future of the contract motor carrier industry, as well as the rights of thousands of shippers who now have available to them highly specialized contract carrier services, with dedication of equipment to their exclusive uses, and which services are tailored to meet the distinct needs of the shippers, are dependent upon the outcome of this litigation. Our position is that these important questions were settled by the Congress in its enactment of the amendments of 1957 to secs. 203(a)(15) and 209(b) of the Act, 49 U.S.C. 303(a)(15) and 309(b), and that they have been properly judicially laid to rest by the opinion of the court below reported in 185 F. Supp. 838 *et seq.* The questions simply need no further argument.

The litigation at bar is nothing more nor less than the apogee of the efforts of the Commission, since enactment of Part II of the Interstate Commerce Act in 1935, to regulate and restrict motor contract carriage for the benefit of motor common carriage. The enactment of Part II of the Act was dated August 9, 1935, 49 Stat. 543, 49 U.S.C. secs. 301 *et seq.*

As is reflected by the opinion below, and by reference to the decisions of the Commission referred to therein, while the Congress had provided in Part II of the Act for the issuance of permits to applicants for authority to engage in contract motor carrier operations, and for certificates to applicants for authority to engage in motor common carrier operations, the Commission embarked upon a course of strangulation of applications for contract motor carrier permits to the extent that the Congress, in 1940, was constrained

to and did enact what it termed a *National Transportation Policy.* This policy was enunciated for the purpose among others, as stated therein, ". . . to provide for fair and impartial regulation of all modes of transportation . . .". It was designed to have the Act ". . . so administered as to recognize and preserve the inherent advantages of each . . ." mode of transportation. This National Transportation Policy, being reported as a note preceding all pertinent parts of the Act, particularly preceding 49 U.S.C. 301, as we are here concerned, was enacted on September 18, 1940, as 54 Stat. 899.

The enactment by Congress of a National Transportation Policy did not accomplish the desired ends. The Commission still sought to impede the development of the contract motor carriage industry by the imposition of various and sundry tests of its own improvisation, resulting ultimately in the decision of this court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409.

The premise with which we are here concerned, however, has been the persistent but unsuccessful effort of the Commission to obtain authority from the Congress under which it could deny applications for contract motor carrier permits solely upon the ground that the applicant had not established ". . . that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

The foregoing quotation is taken from page 131 of the 69th Annual Report of the Commission to Congress (1955), under the head "Legislative Recommendations."

Following the decision of this court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409, in 1956, the

Commission, in its 70th Annual Report to Congress, under the head "Legislative Recommendations," at page 162, recommended that sec. 209(b) of the Act be amended: ". . . (2) *to provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.*" (Emphasis added)

It is interesting to note that in its Reports to Congress in 1955 and 1956 the Commission *acknowledged its lack of statutory authority* to deny contract carrier permits upon the basis that common carriers expressed a willingness to perform the involved transportation as common carriers and that, as hereinafter set forth, the Commission deemed it necessary to obtain Congressional approval for the results and effects of the decisions it had consistently handed down, denying contract carrier applications. The legislation to which we now allude was introduced in the Congress following the foregoing recommendation of the Commission in its 70th Annual Report. We propose to demonstrate, however, that even though the Commission was repulsed by Congress in its effort to impose upon contract carriers what the court below described as the "sixth test", that it did impose just such a test in denying the application of J-T Transport Company, Inc., herein, and solely upon such ground denied the application.

The legislative history of the amendments of 1957 to pertinent sections of the Act is of significance.

In the 1st Session of the 85th Congress the Commission procured the introduction of identical bills in the House and Senate, being H. R. 5123 and S. 1384. The Senate Bill, as amended, subsequently was en-

acted. The House Bill was superseded by H. R. 8825, which was identical with S. 1384 as amended. We shall, therefore, refer only to S. 1384, inasmuch as the hearings were conducted in connection therewith before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate. The distinction between S. 1384, *as introduced and sponsored by the Commission,* and S. 1384, *as enacted into law by the Congress* is of paramount significance.

For convenience we here reproduce S. 1384 as introduced under the sponsorship of the Commission with emphasis added to pertinent portions thereof.

[S. 1384, 85th Cong., 1st sess.]

"A Bill To revise the definition of contract carrier by motor vehicle as set forth in section 203 (a) (15) of the Interstate Commerce Act, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

(1) By changing paragraph (15) of section 203 (a) thereof (49 U. S. C., sec. 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individ-

ual nature required by the customer *and not provided by common carriers.";*

"(2) By adding to section 203 (49 U. S. C. 303) the following new subsection:

"(c) Except as provided in section 202 (c), section 203 (b) in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any transportation for compensation by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation."; and

"(3) By adding to section 212 (49 U. S. C. 312) the following new subsection:

"(c) The Commission may upon its own initiative, upon application of a permit holder or upon complaint of an interested party, after notice and hearing, revoke a permit and issue in lieu thereof a certificate, if it finds that any person holding a permit whose operations on the date of enactment of this paragraph do not conform with the definition of a contract carrier in section 203 (a) (15), as revised , 1957; are those of a common carrier; and are otherwise lawful. The certificate of public convenience and necessity so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points as authorized in the permit."

"Sec. 2. Part II of such Act is further amended by inserting between the words "thereunder," and "that" in the second sentence of section 209 (b) (49 U. S. C. 309 (b)), the following: *"that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown,"* and (2) by changing the third sentence thereof to read as follows: "The Com-

mission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier including terms, conditions, and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirement established by the Commission under section 204 (a) (2) and (6): Provided, That within the scope of the permit and any terms, conditions, or limitations, attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require." (Emphasis added.)

And now, for convenience, we reproduce S. 1384 *as enacted,* and which became effective on August 22, 1957. Therefrom it will be noted that the features of the bill as introduced, upon which we have placed emphasis, have been deleted and, we respectfully present, the Commission was forced to agree to delete same and concede that it could not obtain legislative sanction for the authority which it exercises by administrative edict in the case at bar by the very certain threat of being unable to obtain passage of any legislation with these features remaining therein.

"Public Law 85-163.

"85th Congress, S. 1384.

"August 22, 1957.

"AN ACT.

71 Stat. 411.

"To revise the definition of contract carrier by motor vehicle as set forth in section 203 (a) (15) of the Interstate Commerce Act, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

"(1) By changing paragraph (15) of section 203 (a) thereof (49 U.S.C. 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b)* for the furnishing of transportation services designed to meet the distinct need of each individual customer."

"(2) By adding to section 203 (49 U.S.C. 303), the following new subsection:

"(c) Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate

or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation,"; and

"(3) By adding to section 212 (49 U.S.C. 312), the following new subsection:

"(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203 (a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of some of the same commodities between the same points or within the same territory as authorized in the permit."

"Sec. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209 (b) (49 U.S.C. 309 (b)) a new sentence to read as follows: '*In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the*

changing character of that shipper's requirements.'; and (2) by changing the third sentence of section 209 (b) (49 U.S.C. 309 (b)) to read as follows: 'The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso.

"Approved August 22, 1957." (Emphasis added)

The report of the Commission of June 15, 1959, Appendix D to the jurisdictional statement filed herein by the Commission, issued after the original suit had

been filed by J-T, would lead the court to believe that the Commission of its own volition deleted the objectionable features of S. 1384 as introduced. Such position does violence to the record.

Hearings on S. 1384 were conducted before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate, 1st Session, 85th Congress, on April 17, May 7, 8 and 9, 1957, Senator George A. Smathers being chairman of the Subcommittee. Hereinafter we will refer to the printed transcript of the hearings as Hearings, with appropriate page reference.[1] In the course of the hearings tremendous opposition developed to S. 1384, primarily by virtue of the portions thereof which were eventually deleted, and the bill, as enacted, was the result of a compromise between representatives of the contract carrier industry and the common carrier industry with the understanding that the contract carrier industry had no opposition to the proposed legislation *so long as the existence of common carrier service might not be used by the Commission as the basis for denial of a contract carrier permit*, other prerequisites being met.

In limine, at pages 10 and 11 of Hearings, appears a letter from Mr. William P. Rogers, then Deputy Attorney General, writing on behalf of the Department of Justice to Honorable Warren G. Magnuson, Chairman, Committee on Interstate and Foreign Commerce, with reference to S. 1384, as introduced, in which, insofar as here pertinent, the Department of Justice opposed the bill in part and said:

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[1] "Surface Transportation—Scope of Authority of ICC—Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, First Session." (No. 92433 U.S. Government Printing Office, Washington, 1957.)

"The bill would amend section 203 (a) (15) of the Act by changing the definition of 'contract carrier' to mean any person who engages in transportation by motor vehicle of passengers or property in interstate commerce for compensation (with the exception of common carriers by motor vehicle and those engaged in motor vehicle transportation for hire as an express company) 'under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.*' (Emphasis added.)

"We are opposed to enactment of that part of the definition, which reads '*and not provided by common carriers.*' This quoted limitation is rather vague and it could lead to the contention by common carriers that they provide contract carrier services. Such an interpretation might unduly limit the number and availability of contract carriers. Many contract carriers are small business men who would not be able to compete on a common carrier basis.

"The bill would also amend section 209 (b) of the Act, which sets forth the procedure and criteria to be observed in granting contract carrier permits, by adding a new criterion to the effect that the Commission must find '*that existing common carriers' are unwilling or unable to provide the type of service for which a need has been shown.* (Emphasis added.)

"The Department considers this proposed amendment unduly restrictive of the ability of applicants (particularly small business men) to enter the contract carriage field, and is therefore opposed to its enactment.

"The Bureau of the Budget has advised that there is no objection to the submission of this report."

The testimony of Honorable Owen Clarke, Chairman, Interstate Commerce Commission, in support of S. 1384, appears at pages 21 *et seq.* of Hearings, and we are reasonably sure that when Chairman Clarke testified he knew the attitude of the Department of Justice as reflected by the letter, *supra,* and he knew, as well, that the Department of Commerce was unalterably opposed to both of the objectionable features of the bill. And, of course, he was well aware of the very considerable opposition from shippers needing and using contract motor carrier service and of the contract motor carrier industry at large.

With these facts at hand Chairman Clarke m[illegible]nanimously [sic] agreed (Hearings page 22) to del[illegible] from the proposed amendment to section 209 (b) (49 U.S.C.A. 309 (b)) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," but, *and here the joker,* he said nothing about deleting the proposed amendment to section 203 (a) (15) (49 U.S.C.A., section 303 (a) (15)) "*. . . and not provided by common carriers.*" Throughout the testimony of Chairman Clarke he sought enactment of the legislation with the above feature remaining therein, the practical effect of which would have been to give the Commission authority to do that which it has here done, without authority, by administrative edict, and say that a carrier could not perform a service as a contract carrier if a common carrier offered to provide such a service.

The Congress refused to grant the Commission the authority it sought; deleted "and not provided by common carriers," and thereby definitely established that the existence of common carrier service *was not to preclude issuance of contract carrier permits, other*

prerequisites being met. That, however, is exactly what the Commission has here done.

We shall now endeavor to demonstrate from the legislative history of S. 1384 that deletion of these objectionable features was not due to magnanimity on the part of the Commission, and that S. 1384 became law *only by virtue of the fact that the Congress did not propose to authorize the Commission to deny an application for a contract carrier permit upon the basis of a common carrier averring its willingness to perform the needed transportation,* all other prerequisites being met.

We will not burden the Court with extensive quotations from the evidence adduced at the Hearings, but do say, without fear of successful contradiction, that S. 1384 with "and not provided by common carriers" remaining therein received the enthusiastic support of the Commission, of *common carriers* and the various Associations representing them. The Senators, however, were dubious of this joker, and the Department of Commerce, joining forces with the Department of Justice, as well as shippers, contract motor carriers, and Associations representing contract motor carriers vigorously opposed same upon the ground that the Commission would interpret it as authority to deny a contract carrier permit upon the ground that a common carrier averred a willingness to perform the same service.

Hon. Louis S. Rothschild, Undersecretary for Transportation, Department of Commerce, testified before the Subcommittee on May 8, 1957; his testimony appears at pages 197 et seq., of the Hearings. The Senators, in the course of his testimony, evinced an early interest as to his views with respect to the

"joker". Before Mr. Rothschild could get to the point Senator Schoeppel, at page 200, said:

> I would like to ask a question right there: Supposing you had a common carrier serving certain territory but wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonable adequate and prompt service?

To the foregoing question Mr. Rothschild, at page 201, responded:

> Well, later in my statement, Senator Schoeppel, we say that we don't quite believe that the rule should be as stringent as proposed by the ICC and that it should not be necessary to make all of these showings in order for a person to get a contract carrier.

On the same page, speaking with reference to the contract carrier industry, Mr. Rothschild said:

> Contract carriers by motor vehicle developed prior to enactment of the Motor Carrier Act in response to the needs of certain shippers who could not or preferred not to provide their own transportation, yet required a more specialized and individual service than was available from common carrier.
>
> A contract carrier would enter into a special agreement with a single shipper, usually on a long-term or individual basis, under which the carrier would provide a service which was closely integrated to the particular needs of the shipper. It was the kind of service which the shipper himself might have provided had he so elected, and it constituted in essence a virtual dedication of the carrier to the needs of a single shipper, or in some cases, a group of closely related shippers.

> The Congress, in enacting legislation to regulate the motor transportation industry, recognized this development and provided for a different degree of regulation applicable to contract carriers than it provided for common carriers.

Senator Smathers, Chairman of the Subcommittee, and Mr. Rothschild, clearly express the Congressional intent in deleting the joker *"and not provided by common carriers"*, at pages 202 and 203 of the Hearings.

Mr. Rothschild, among other things not here pertinent made this statement at page 202:

> Commissioner Clarke, in testifying on S. 1384 yesterday withdrew the Commission's request for authority to deny application for contract authority unless it is shown that existing common carriers are unwilling or unable to provide the required type of service.

He was interrupted by an immaterial question, and then Mr. Rothschild continued in response to a question from Senator Smathers, as follows:

> "We would not object to that change. However, *the Department does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of a contract carrier by motor vehicle as one of the distinguishing characteristics of a contract carrier.* Perhaps I should explain that a little more, Mr. Chairman." (Emphasis added.)
>
> Senator Smathers: We would appreciate it.
>
> Mr. Rothschild: As we read the proposal of the Interstate Commerce Commission, and then the amended position which they took in Commissioner Clarke's statement yesterday, *we believe that what they are currently proposing is that in the definition of a contract carrier by motor vehicle,*

the existence or non-existence of common carrier motor service should be included, but when it comes to their own procedures as to how they operate under this, they retain for themselves the right to cast that qualification out. *We think, in order to be consistent, it ought to be out both places.* (Emphasis added.)

Senator Smathers: In other words, as the Senator from Kansas brought out, whether or not there is the availability of a common service should not be a point in consideration?

Mr. Rothschild: *They should not be able to deny the application of a common* [sic] (*contract*) *carrier simply because someone claims that there is common carrier service there.* (Emphasis added.)

Senator Smathers: Thank you.

Mr. Rothschild: Does that answer your question, Senator Schoeppel?

Senator Schoeppel: Yes.

The Department of Commerce had introduced a bill of its own designed to redefine "contract carrier", and in connection therewith a comparison was being made by the Senators with the ICC sponsored bill. At page 204 of the Hearings, and during the course of Mr. Rothschild's testimony, Senator Smathers said:

So then you people made a proposal and the ICC has made a proposal. Now let's look at the ICC proposal for just a minute to see how they propose to redefine what we mean by contract carriers. I am going to read. (Senator Smathers then reads the proposed definition of contract carrier contained in the proposed amendment to S. 1384, including "and not provided by common carrier". And then the Senator goes on): Now as I gather it, your particular recommendation is

that there be no limit as to the number of persons with whom they do business?

And then the following colloquy took place:

Mr. Rothschild: No, sir; we think the Commission should have the right to take into consideration the number of contracts that a contract carrier would have, but we do not believe that this definition which is contained in line 4, 5 and 6 should apply at that point any more than the Commission says it should not apply in Section 2 of the same proposal.

Senator Smathers: In other words, then, you would be satisfied with the language on line 3, page 2, "under continuing contracts with one person or a limited number of persons"?

Mr. Rothschild: For the furnishing of transportation services.

Senator Smathers: For the furnishing of transportation services of a special, etc. But I want to get just this language here that you are satisfied with.

Mr. Rothschild: We would stop that definition with the word "customer" in line 6.

Line 6 in the format of the Bill was simply "customers not provided by common carriers", and as Mr. Rothschild told Senator Smathers, the Department of Commerce would put a period after "customers" and delete "not provided by common carriers".

And then further, in discussing the proposal of Chairman Clarke to delete "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and leaving in "and not provided by common carriers", the following discussion took place between Senator Smath-

ers and Mr. Rothschild at pages 206 and 207 of Hearings:

Senator Smathers: . . . Now, we come on down to the next line: "for the furnishing of transportation services of a special and individual nature required by the customer". You want to start right there and "not provided by common carrier"?

Mr. Rothschild: We still prefer our own definition, but this would be the same.

Senator Smathers: Except you leave out "and not provided by common carriage".

Mr. Rothschild: Yes.

Senator Smathers: We, as a committee, don't like to be caught between departments of the government, so to speak, the ICC with one bill, and the Department of Commerce with another bill, each one fighting for its own language because we have to resolve it a little bit. This language to be satisfactory to you I gat! we left off that last phrase on line 6 "and not provided by common carrier" is that correct?

Mr. Rothschild: Yes, sir.

Senator Smathers: Did I get an answer to that?

Mr. Rothschild: The answer is yes.

Senator Smathers: I understand yesterday Chairman Clarke withdrew the Commission's support for this last phrase; is that correct?

Mr. Rothschild: In section 2, not in section 1.

Senator Smathers: Not in section 1, but in section 2. You will find it on page 10 of your statement. What did he have reference to in this bill where he said he wanted to withdraw it?

Mr. Rothschild: May I read a paragraph from your statement of yesterday?

Senator Smathers: Yes, so we can clear on it.

Mr. Rothschild: Commissioner Clarke said that: 'as drafted, S. 1384 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Commission upon further consideration voted to withdraw its recommendation to amend section 209. We therefore recommend that lines 9 through 15 on page 3 be amended to read:

(Mr. Rothschild continues): So that would eliminate the words that existing common carriers are unwilling or unable to provide the service for which a need has been shown.

Senator Smathers: He would eliminate that on lines 12, 13, and 14. Is that correct?

Mr. Rothschild: That is correct.

Senator Smathers: Is it your understanding, Mr. Barton—how does he feel about it on line 6, do you know?

Mr. Barton: (Commission counsel): I understand he wanted to withdraw that requirement altogether.

Mr. Rothschild: *Our interpretation may not be correct, but we think he wanted it in the definition but not in section 2. We think it should come out in both places.* (Emphasis supplied.)

As a definite indication that the Senators were interpreting the proposal to delete "and not provided by common carriers" as assurance that the Commission would not have authority to deny a contract carrier permit because common carrier service was alleged to

be available, we refer the Court to Hearings, page 214, where the testimony of Mr. H. O. Matthews, General Manager of the Transportation and Distribution Division of Armour & Company appears:

> Mr. Matthews: As I understand it, Senator, it would permit the common carriers to complain that they are in a position to render that same service, and therefore the Commission would take the contract carrier out of business, or quit.
>
> Senator Smathers: Well, we have all agreed—you just heard the Department of Commerce here, and you heard probably the Secretary of the ICC yesterday——
>
> Mr. Matthews: I didn't hear him.
>
> Senator Smathers: *Apparently they are in agreement that they should strike out the words "and not provided by common carriers".* (Emphasis supplied.)
>
> Mr. Matthews: This, of course, was prepared around that, and I didn't understand what the Secretary was saying.
>
> Senator Smathers: If we leave out the words "not provided by common carriage", even though there may be common carriage in the area, it does not prohibit you from still doing business with a contract carrier.
>
> Mr. Matthews: With the suggestion of changes in the wording you were making a while ago, Senator, that might change that, although I haven't had an opportunity to review it. I didn't have the bill in front of me, and this statement was based on the bill as it was worded, and I will not burden you with reading further on that because that might be ambiguous to the situation as it exists should the bill be changed.
>
> Senator Smathers: All right.

> Senator Schoeppel: Mr. Chairman, that just points out we have a perplexing problem here to incorporate language in the bill. Our friends from the ICC submitted a bill the way they wanted it. Now there have been some changes suggested. Now you come up with these points, and we have to wrestle with it. Now, some of these explanations here, by way of illustration, furnish us with an opportunity for discussing this matter in executive session and otherwise, to keep this thing on some kind of a, let us say, progressive yet equitably fair legislative basis.

With respect to the proposal of the Commission to delete "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" in section 2 of proposed S. 1384 and leaving "and not provided by common carriers" in section 1 thereof, Mr. Matthews, at page 219 of the Hearings said:

> *Based upon Chairman Clarke's prepared statement my opposition to S. 1384 is intensified rather than eliminated. As I read his testimony, no change is suggested in section 1 of the proposed bill. The entire change to be in section 2. While the test to be applied to a new contract carrier is possibly modified to some extent by the amendment, it would still be extremely difficult to obtain new contract carriage within the definition of section 1 of the Act.*

To the same effect see the testimony of Hon. Clarence D. Todd, General Counsel for the Contract Carrier Conference of the American Trucking Associations, Inc., and the colloquy between Mr. Todd, Senators Schoeppel and Lausche, in which it was developed that leaving "and not provided by common carriers" in the proposed bill would enable the Com-

mission to withhold permits for contract carriers to the same extent as would have been the case had "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" been permitted to remain therein. And, in this same connection, see the colloquy between Senator Lausche and Mr. Howard E. LeFevre, a contract carrier serving Ford Motor Company, in which it was developed that to delete "and not provided by a common carrier" would prevent the Commission from denying an application for a contract carrier permit or extension of a contract carriers' service on the ground that a common carrier was willing to provide the service.

In the testimony of Mr. E. G. Rice, President, Complete Auto Transit, Inc., a contract carrier serving General Motors, reference again is made to the proposal of the Commission to delete one portion of the objectionable feature of S. 1384 and leaving in the joker "and not provided by common carriers". At page 328 of Hearings, the following appears:

> Senator Lausche: You are not giving testimony on S. 1769?
>
> Mr. Rice: No. There is a provision in there that the service will not be provided by common carrier, and that Mr. Clarke did nothing about. However, further on there is the matter of the issuance of a permit and a common carrier being fit, willing and able. That he agreed to take out. However, *I make the point if it is in the first place you will never get to the second. You can't become a carrier under the definition, so it should come out in both places, and I think Mr. Todd so testified.*
>
> Senator Lausche: I think he testified that S. 1384 would further provide that additional per-

mits may be issued only upon showing that existing common carriers are unwilling or unable to render the required type of service. Now, your opposition to this proposal is that while he agrees to rectify the language in Section 1, part II, he doesn't do so in the definition?

Mr. Rice: That is right, and you will never reach Part II because you wouldn't be a carrier under the definition.

Senator Lausche. I see, all right. Thank you very much.

Mr. Rice: *So it should be out in both places.* Thank you. (Emphasis added.)

We have made the statement heretofore that S. 1384 as enacted, was compromise legislation worked out between the Commission and the representatives of the contract and common carrier industries, with the understanding and agreement that the Commission might be granted authority to limit contract carriers as to the number of contracts which they might hold and the services which they might perform, but that the Commission *would not have authority to deny an application for a contract carrier permit on the ground that a common carrier was willing to perform the proposed transportation service for which a need has been shown.* In support of our statement we respectfully refer the Court to the testimony of Mr. Thomas F. Robertson, Executive Director, Common Carrier Conference—Irregular Route—American Trucking Associations, Inc. Hearings, pp. 345 et seq. Mr. Robertson prefaces his testimony by the statement that the carriers he represents are those which are most competitive with the contract carriers, and then he says:

We have studied these bills and we have discussed them with our colleagues up in ATA and in

deference to our contract-carrier colleagues the membership of our conference would be most happy to yield on several points in the bill. We would yield to the removal of the word "specialized" in the definition which I think is in Part I, where they talk about special and individual nature, *and we would also yield to the deletion of the words "and not provided by common carriers," in addition to what the Commission has already yielded in Part II of the Act, where the Commission lately made up its mind that it would remove that "unwilling and unable" that burden of proof that a contract carrier would have.* (Emphasis supplied.

We would yield these things to gain the *main objectives*, sir, and the main objective, to our point of view, is that the Commission have the unequivocal power to limit the number of contracts, and that they also would have a reasonable grandfather clause that would protect the property rights of those contract carriers who would no longer be within the new definition. We think that only fair.

After hearing the testimony of Mr. Robertson on the compromise legislation which had been worked out the Senators took special precautions to see that the Interstate Commerce Commission was represented and had no objection to the compromise, as appears at page 348 of the hearings, as follows:

Senator Lausche: Is there a representative of the Interstate Commerce Commission here today?

Mr. Hardin: Yes, sir.

Senator Lausche: You are hearing what is being said?

Mr. Hardin: Yes, sir.

Senator Lausche: All right.

A reference to S. 1384, as enacted, *supra,* will disclose that Congress prescribed five, and only five, prerequisites for the issuance of a contract carrier permit. In the case at bar the Commission has added a *sixth test,* contained in S. 1384 as introduced, deleted by agreement and in the face of invulnerable opposition, under the heading "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and "and not provided by common carriers". In this connection we find the same view prevailing with at least some members of the Commission. Commissioner Webb, at pages 60a, et seq. of Appendix "D" to the jurisdictional statement filed by the Commission herein, has this to say:

> "Weighing the five tests prescribed by Section 209 (b) of the Act for determining whether a permit should be issued, I agree with the result reached by the majority. *It seems to me, however, that the report prescribes a sixth test not authorized by Congress and, in fact, a test considered by the Congress and deliberately rejected.* The report seems to me to convey the impression that if an applicant for contract carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of Section 209 (b) have been satisfied. (Emphasis added.)
>
> "What I call the sixth test prescribed by the report is the conclusion that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shippers' reasonable transportation requirements. *The conclusion, in my opinion, is not supported by the language of public 85-163 or by the pertinent legislative history.* (Emphasis added.)

"When the bill S. 1384 which became public law 85-163 was introduced, it amended Section 203(a) (15) of the Act so as to define a contract carrier as one who conducts its business other than as a common carrier and—". . . under continuing contract with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*"

"The Senate Committee on Interstate and Foreign Commerce deleted the language emphasized above. In addition, the Committee eliminated from the bill the requirement of a showing under Section 209 (b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the Committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers." As thus amended, the bill was enacted into law.

"Obviously there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted that language solely because it required an impossible burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in Section 203 (a) (15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in Section 209 (b) "that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown."

"Contract carriers opposed the bill as originally introduced on the ground that the required proof as to the non-existence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public and convenience necessity standard in Section 209 proceedings disappear when, under the new law, permits cease to be unrestricted licenses for hunting traffic. *As I see it the report attempts to write into Section 203 (a) (15) and 209 (b) language deliberately stricken by the Congress. The report converts compromised legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating defeat for contract carriers.*" (Emphasis in last paragraph supplied).

Commissioner Webb, prior to the preparation of his opinion, *supra,* had undoubtedly been in close contact with the progress of S. 1384 as it moved to final enactment by the Senate, as well as with H. R. 5123, as superseded by H. R. 8825, as it progressed through the House, and had been in attendance at the executive sessions of the Commission in which it was determined that in the face of substantial opposition to the efforts of the Commission to obtain legislative sanction for denial of contract carrier permits if common carrier service was available, it would abandon such approach and seek enactment only of those features of S. 1384 worked out in compromise.

Senate report No. 703 of the First Session, 85th Congress, was submitted by Senator Smathers of the Committee on interstate and foreign commerce to accompany S. 1384. In the introduction he states the purpose of the bill, and there is no indication in the

statement of purpose of any intent to grant the Commission additional authority to impose the sixth test referred to by Commissioner Webb.

Senator Smathers and the Committee emphasized recognition of the distinction between the two modes of transportation, i. e., contract and common motor carriage when, in speaking with reference to the proposed redefinition of contract carriage the report on page 2 says:

> "Congress recognized in the definition a difference between common and contract carriers, but, as Commission Chairman Clarke pointed out, the language of the present law is inadequate for proper administration and for observing the distinctions which Congress contended. Under the bill as introduced a contract carrier would be one who conducts its business other than as a common carrier and . . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.* (Emphasis supplied.)
>
> "Chief among the differences thus proposed are that a contract carrier could have only one contract or a limited number of contracts. *Important also is that the service would be such as it not provided by common carriers. These changes would constitute a significant tightening of the present law.*" (Emphasis supplied.)

And, then, in further reporting on S. 1384 as introduced, the report at page 3 says:

> "A further change would be effected whereby that portion of Section 209 (b) (49 U. S. C. 309 (b)) relating to the issuance of a contract carrier permit would include a provision that a permit

would be issued when it appears, inter alia, 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' Presumably this was intended by the drafters to supplement the language in the definition providing that a contract carrier service is such as is 'not provided by common carriers.'"

And, then, as here pertinent, the report of the Committee on page 3 continues as follows:

"Undoubtedly the bill as introduced would supply a more positive statutory guide to the Commission than that existing today, and would make readily possible clearer distinctions than now exists as between motor common and contract carriers. *The Committee is of the opinion, however, that, as originally introduced, S. 1384 would be unduly restrictive on contract carriage. Accordingly, the Committee recommends a number of amendments to the bill.*" (Emphasis supplied.)

The Committee then, after observing that S. 1384 as introduced was the first specific attempt by the Commission to procure enactment of legislation on the subject matter thereof, reported thus on page 4:

"However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 *would provide too rigid a pattern.* It decided that the proposed requirement in Section 209 (b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service should be withdrawn. And it asked for opportunity to make additional comments should the testimony of other parties propose further amendments. As will appear later, further amendments

were proposed, and the Commission has given the Committee its views respecting them."

The Committee, in its report, then details the support to S. 1384 by witnesses representing the common carriers, their associations, and the railroads, as well as the opposition to S. 1384 from substantial shippers, contract carriers, and associations representing contract carriers. The Committee then said at page 5 of its report:

> "The Department of Commerce, speaking through the Under Secretary for transportation, noted critically that some contract carriers today furnish a common carrier service and argued that a limitation on the number of contracts that may be heard is desirable, as proposed in the bill. *It does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of contract carrier.*" (Emphasis supplied.)

In further discussing the amendments recommended by the Committee which would strike from Section 1 of S. 1384 as introduced the language "and not provided by common carriers," and which would strike from Section 2 thereof the language "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," the Committee said at pages 5 and 6 of its report:

> "Insofar as language is concerned, there can be no doubt that some of the parties at first entertained rather sharply divergent views as to the wording Congress might wisely and fairly adopt to express its own considered judgment. That all parties or groups affected by the bill are earnestly concerned with the problems giving rise to its

introduction is evidenced by the variety and range of interests appearing and testifying, and by the thoughtfulness of their presentation.

An apparent desire to obtain constructive legislation has motivated the most active parties and groups to confer, since the hearings, to arrive at language acceptable to them, and to communicate to the Sub-Committee through their spokesmen their views and their proposed language. The language thus arrived at has been submittted also to the Interstate Commerce Commission, and we have been officially notified of the Commission's approval thereof. It appears to your Committee that the major defects in the present Statute would be corrected by the new language, and the major objectives of S. 1384, as introduced, would achieve *without unduly restricting contract carriage.*" (Emphasis supplied.)

The report is speaking, of course, of S. 1384 as proposed to be amended by the Committee, deleting the objectionable features of Sections 1 and 2 thereof pointed out, *supra*. The proposed amendments to S. 1384 are then set out in the report. They delete from S. 1384 as introduced the features to which the contract carriers and their representatives had objected, i. e., "and not provided by common carriers" contained in proposed Section No. 1, and "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" in proposed Section No. 2, whereby the Commission would have been granted authority to deny applications for contract carrier permits upon those bases.

The House of Representatives issued its report No. 970 to accompany H. R. 8825, this bill being identical to S. 1384 as enacted. The report, in stating the purpose of the proposed legislation, makes no mention

of any intention to permit the Commission to deny a contract carrier application upon the ground that common carrier service is allegedly available. In support of our statement heretofore made that the legislation enacted was compromise legislation, the compromise, insofar as here pertinent, being in striking from the bills "and not provided by common carriers" and "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," we refer to page two of House Report No. 970 as follows:

> "Hearings were held on H. R. 8825 by the Transportation and Communications Subcommittee of this committee on July 23, 1957. A predecessor bill, H. R. 5123, was introduced *at the request of the Interstate Commerce Commission* to implement its legislative recommendation No. 6 contained in its Seventieth Annual Report to the Congress. *The latter bill was not satisfactory to various groups affected by this legislation. Further conferences were held among these groups and a compromise bill was prepared as a substitute for H. R. 5123.* A substitute bill, H. R. 8825, has the support of the Interstate Commerce Commission, Association of American Railroads, all segments of the trucking industry represented by American Trucking Associations, Inc., including the Regular Common Carrier Conference and the Contract Carrier Conference, and the Transportation Association of America." (Emphasis added.)

It is clear that by enactment of S. 1384 the Congress intended it as a mandate to the Commission to effectuate the National Transportation Policy and so to administer the Act as to recognize and preserve the inherent advantages of both contract and common motor carrier service. In this connection the Com-

mittee on Interstate and Foreign Commerce of the Senate, in the concluding statement of its report, said:

> "Common and contract carriage are unlike; the degrees of regulations applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as to properly reflect these differences."

Senate Report No. 703 is published in *U. S. Code Congressional and Administrative News,* 85th Congress, 1st Session, at page 1599.

Further, in this same connection, Senator Smathers inserted in the Congressional Record of August 8, 1957, at page 12770 a statement in explanation of the bill, where he stated that the differences between contract and common carriers by motor vehicle are important and meaningful at law and in practical effect, and:

> "What the Committee has attempted to do, among other things, is to preserve genuine contract carriage for its proper role in our transportation economy."

Senator Smathers then discussed the decision of the Supreme Court in the *Contract Steel Case, supra,* and concludes his remark as follows:

> "The decision of the Supreme Court clearly means that the Congress should do something to correct the situation. *The Commission came to us with a bill designed to solve the problem. The language of that bill was unacceptable to certain of the parties, especially the contract carriers.* Those contract carriers, however, support the bill as now drafted. . . . The new bill, *while not as drastic as the Interstate Commerce Commission's*

proposals, achieves many of the purposes sought to be achieved by the Commission in its bill. In view of all this, the committee recommends that the bill be approved."

SUMMARY AND CONCLUSION

In the orders of the Commission attacked in the court below J-T Transport Co., Inc. was found to be a contract motor carrier within the meaning of the Act. Under its application for a permit it proposed, under a continuing contract with one shipper to furnish transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of this shipper and to furnish a transportation service designed to meet the distinct need of this customer, as provided in sec. 203(a)(15) of the Act, 49 U.S.C. 303(a)(15).

Sec. 209(b) of the Act, as amended, 49 U.S.C. 309 (b) is mandatory and, in pertinent part, is as follows:

> "Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to sec. 210, a permit *shall* be issued to any qualified applicant therefor authorizing in full or in part their operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the National

Transportation Policy declared in this Act; otherwise, such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.*" (Emphasis added)

There is no averment in the jurisdictional statement filed on behalf of any appellant that J-T Transport Co., Inc. is not fit, willing or able to meet the requirements of the Commission for issuance of a permit as a contract motor carrier.

We would not presume to say that the Commission should not, in applying the *five* tests set forth in sec. 209(b) of the Act, as amended, also take into consideration the question of consistency with the public interest and the National Transportation Policy as enunciated by Congress, but we do say, with all the emphasis at our command, that where the Commission has gone to the Congress and said, and we paraphrase:

> "Give us authority to deny applications for contract motor carrier permits solely upon the ground that a motor common carrier avers its willingness and ability, as a common carrier, to perform the involved transportation, and to that end add to sec. 203(a)(15) the proviso 'and not provided by common carriers', and incorporate in sec. 209(b) of the Act the phrase 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.'"

and that to this request of the Commission the Congress answered an emphatic *NO*, such refusal merits great consideration.

The foregoing is precisely the request made by the Commission of the Congress in 1957. The request of the Commission was opposed by the Department of Justice and by the Department of Commerce, as well as by numerous segments of the affected economy, shippers, motor carriers, and their associations, alike.

By its administrative edict in the orders herein attacked the Commission would add to the criteria for granting a permit to an applicant to perform contract motor carrier service the "sixth test", as above, and it is solely and alone upon the imposition and application of such "sixth test" that the Commission has denied the application involved in this proceeding.

We see no need to burden the court with citation of precedent to its long-established rule that the legislative history of enactments of Congress is to be accorded significance in construing the intent of Congress, and neither do we deem it indicated that we cite authority for the proposition that where the Commission goes before Congress and asks for authority to apply *six tests*, and receives authority to apply *five tests*, that the age-old maxim *inclusio unius exclusio alterius* comes into full play.

It is the position of J-T Transport Co., Inc. that the court below has fully considered and properly decided all factual and legal questions involved, and that the appeals herein present no substantial question for the decision of this court.

It is respectfully submitted, therefore, that the motion of J-T Transport Company, Inc. to dismiss or

affirm should be sustained, and that this court should not assume jurisdiction in the causes.

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January 16, 1961

APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

Served

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If the exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-11185 (Sub-No. 102)

J-T TRANSPORT COMPANY, INC., EXTENSION—INDIANAPOLIS, IND.

Decided

1. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, un-

crated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans., found consistent with the public interest and the national transportation policy.

2. Dual operations approved.

3. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

James W. Wrape for applicant.

Douglas McHendrie, Paul F. Sullivan and *Ernest A. Brooks, II* for protestants.

REPORT AND ORDER

RECOMMENDED BY LEO W. CUNNINGHAM, EXAMINER

By application filed March 14, 1957, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on May 22, 1957 at Denver, Colo. Rail carriers in the involved area and seven motor common carriers oppose the granting of the application.

Applicant, as pertinent herein, now holds authority to operate as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, (except airplane engines, (1) from Grand Prairie, Tex., to Burbank, Calif., (2) from Burbank and Manhattan Beach, Calif., (3) Brady and Grand Prairie, Tex., and Utica and Detroit, Mich., to Wichita, (4) between Garland and Grand Prairie, Tex., and

on the one hand, and, on the other, St. Louis, Mo., and (5) between Litchfield Park, Ariz., and Columbus, Ohio. It also holds temporary authority for 120 days beginning April 9, 1957 to operate as a contract carrier by motor vehicle, over irregular routes, of landing gear bulkheads, uncrated, requiring special equipment and special handling, from Indianapolis to Wichita. Applicant operates 33 tractors and 45 trailers. The trailer which it is using from Indianapolis to Wichita under its temporary authority and which it will use in the proposed operation if the authority sought is granted was specially constructed. It is 35 feet long, 12 feet 6 inches high and 8 feet wide. It has an underslung frame and an electric elevator is built in the trailer which operates with cables to raise and elevate the floor from the underslung part of the trailer up even to the rear wheels so that an airplane part can be rolled in or out. The roof also raises up and down with the elevator. Special floor racks move with the trailer for the loading and unloading of airplane parts. A terminal is maintained at Wichita.

Applicant's balance sheet as of April 30, 1957, shows current assets of $162,744, current liabilities of $78,333, and surplus of $240,801. Its net profit for the first 4 months of 1957 was $7,664. Applicant is fit and able, financially and otherwise, to perform the proposed operation.

Applicant has two affiliated motor carriers under common control, namely, Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, which has authority to operate as a common carrier, over irregular routes, of automobiles and trucks, in initial movements from Detroit and points in that area to certain points in Kansas and Missouri, and Jack Cooper Transport Company, Inc., which holds authority to operate as a contract carrier by motor vehicle, over irregular routes, (1) of automobile, trucks, and buses, in initial movements, from Kansas City to points in several States, and (2) automobiles, trucks and buses, in secondary movements, between points in 14 western States.

Boeing Airplane Company supports the application. As pertinent herein, it operates a plant at Wichita for the production of airplanes. It has been using applicant's service to transport landing gear bulkheads from Indianapolis to Wichita for about 4 months to the extent of about 4 loads a month. A load consists of 4 landing gear bulkheads, each weighing about 1380 pounds. The bulkheads are made of aluminum, titanium and magnesium and extreme care must be used for their transportation. Each one is worth about $24,000. Applicant's one piece of equipment as above-described was made for the exclusive use of this shipper for the operation involved herein and such equipment is necessary to adequately handle its transportation requirements from Indianapolis to Wichita. Applicant now serves this shipper and works closely with it on its transportation problems and since it has a terminal at Wichita its equipment can be furnished on short notice. The bulkheads must move in an expedited service as they must be at the plant when they have to be installed at a certain specified time. Prior to the use of applicant's service rail service was used but the cost of constructing special containers made this service prohibitive. Although in the past only landing gear bulkheads have moved other airplane parts may move in the future.

The record shows that there is interline rail service from Indianapolis to Wichita and that they are in a position to handle additional traffic.

Three motor common carriers submitted evidence in opposition to the application as pertinent herein. U.S.A.C. Transport, Inc., operates, over irregular routes, for the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between points in the United States east of the Mississippi River, on the one hand, and, on the other, points west of the Mississippi River. It operates 115 tractors and 227 trailers and

maintains terminals at Indianapolis, Dallas, Tex., and Topeka, Kans., among other points. It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein. It claims that if its equipment is not suitable for the transportation requirements of the shipper herein it will construct any type of equipment that is needed.

Belger Cartage Service, Inc., operates over irregular routes, for the transportation of heavy machinery and such commodities as require the use of special equipment by reason of size or weight, between points in Missouri and Kansas. It has solicited the shipper for traffic but has never received any. Daniel Hamm Drayage Company operates, over irregular routes, for the transportation of commodities, the transportation of which, because of size or weight, require the use of special equipment, between points in Indiana and Missouri. By an interline arrangement at Kansas City these two motor carriers contend that they could handle the traffic herein. Hamm claims to have some equipment that could be used to satisfy the shipper's needs from Indianapolis to Wichita. All of the above-named three motor carriers are in a position to handle additional traffic.

Summarizing briefly, one shipper supports the application. As concerned herein, it now is using applicant's service under temporary authority from Indianapolis to Wichita. Applicant has constructed a special unit of equipment as hereinbefore described to handle the shipper's traffic as herein involved and such equipment is dedicated to the exclusive use of the supporting shipper. Applicant's terminal at Wichita is located near the shipper's plant and its special equipment can be obtained on one hour's notice. In the circumstances, the examiner is of the opinion that a need has been shown for the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent.

Because of the affiliation and control of applicant with other motor carriers previously mentioned, the question of dual operations under section 210 of the Interstate Commerce Act arises. Applicant maintains records and personnel separate from the affiliated companies. The commodities are different and the equipment is not interchangeable. Dual operations were approved by the Commission in Nos. MC-11185 (Sub-No. 94), MC-11185 (Sub-No. 91), MC-11185 (Sub-No. 96) and MC-110077. Similar approval is warranted here as the existing situation would not be materially changed by the granting of the instant application.

The examiner finds that operation by applicant as a contract carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of the fragile nature thereof, from Indianapolis, Ind., to Wichita, Kans., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder; and that a permit authorizing such operation should be granted.

The examiner further finds that the holding of a permit by applicant and the holding of a certificate No. MC-110077 by Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, and the holding of a permit in No. MC-30884 by Jack Cooper Transport Company, Inc., will be consistent with the public interest and the national transportation policy.

It is recommended that the appended order be entered.

By Leo W. Cunningham, Examiner.

(Signature) LEO W. CUNNINGHAM

Recommended by Leo W. Cunningham, Examiner

(Signature) LEO W. CUNNINGHAM

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1957.

No. MC-11185 (Sub-No. 102)

J-T TRANSPORT COMPANY, INC., EXTENSION—INDIANAPOLIS, IND.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with all requirements of sections 215 and 218 of the Interstate Commerce Act, with the rules and regulations thereunder, and with the requirements established generally and discussed at some length in *Contracts of Contract Carriers,* 1 M.C.C. 628, a permit be issued to applicant authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of the commodities described, and in the manner described, in the findings in said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on .

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

(SEAL)

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil Action No. 1531

ELVIN L. REDDISH, *Plaintiff*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Plaintiff*

L. A. TUCKER TRUCK LINES, INC.
ORSCHELN BROS. TRUCK LINES, INC.
ARKANSAS-BEST FREIGHT SYSTEM, INC.
EAST TEXAS MOTOR FREIGHT LINES, INC.
GILLETTE MOTOR TRANSPORT, INC.
WESTERN TRUCK LINES, LTD.,
REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN TRUNK LINE TERRITORY, *Intervening Defendants*

Before MATTHES, *Circuit Judge,* and MILLER and YOUNG, *District Judges.*

This opinion prepared by Judge Young and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further pro-

ceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

/s/ M. C. MATTHES
Circuit Judge

/s/ JNO. E. MILLER
District Judge

/s/ GORDON E. YOUNG
District Judge

Opinion

This is an action before a three-judge district court to enjoin and set aside orders of the Interstate Commerce Commission which denied plaintiff, Elvin L. Reddish, permanent authority to operate as a contract carrier by motor vehicle in interstate commerce. 28 U.S.C. §§ 1336, 1398, 2284 and 2321 through 2325 inclusive. By statute, the action is against the United States, represented by the Attorney General, while the Interstate Commerce Commission is made a party by right. 88 U.S.C. § 2323 (1958).

The Contract Carrier Conference of the American Trucking Associations, Inc., intervened before the Commission, and in this action on behalf of the plaintiff, the Commission is supported, in turn, by six common motor carriers, 32 railroads, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., all of whom intervened before the Commission and in this action in opposition to the authority sought by plaintiff.

In its answer, the United States admitted all of the allegations of the complaint.[1] The United States filed a brief

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[1] Paragraph 12 of the complaint alleged: "The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole."

in this Court in support of its position that the orders of the Commission should be set aside and the cause remanded for further proceedings. Counsel for the Government also appeared at the hearing and presented oral argument. In summary, the Government's position is that the Commission erred (1) in concluding that grant of the applicant would adversely affect the protesting carriers; (2) in concluding that denial of the application would not adversely affect the supporting shippers.[2]

The Interstate Commerce Commission, in its answer, denied that its action in denying plaintiff the permit he requested was unlawful, and stated that the action it had taken was fully supported and justified by the record.

The trial examiner of the Commission found that the service proposed by plaintiff would be consistent with the public interest and the national transportation policy, and recommended that the authority requested be granted. Division 1 of the Commission, however, denied the authorization requested although the trial examiner's findings of fact were adopted by the Commission as their own. The action of Division 1 was sustained by the full Commission, which held:

> "(a) that the findings of Division 1 are in accordance with evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument."

This action was brought by plaintiff for judicial review of this denial by the Commission.

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[2] Encompassed in the second point is the contention that the Commission erred in treating as irrelevant the injury to supporting shippers caused by the higher cost of common carrier service; erred in concluding that the supporting shippers would not be adversely affected by withholding from them a contract-carrier service meeting transportation needs which the existing common carriers do not adequately meet.

There is no material dispute as to the facts. They are as follows:

Plaintiff requests permanent authority to operate as a contract carrier for Steele Canning Company and Cain Canning Company of Springdale, Arkansas, and for Keystone Packing Company of Fort Smith, Arkansas. He proposes to handle pooltruck shipments of less-than-truckload orders intended for delivery in 33 states, and to handle certain canning supplies on his return trips from 30 of these states. Steele Canning Company is the major shipper of the three that plaintiff proposes to serve. Steele normally purchases about 75% of the production of Cain and Keystone, which Steele in turn resells to the wholesale and retail market. Steele began transporting its own small order loads in 1948. This operation increased as Steele's small order business increased, until the fleet of trucks operated by Steele numbered 29 in January of 1958. Throughout this period Steele handled most of its truckload shipments by common carrier, principally Jones Truck Line, Inc. of Springdale, Arkansas, who supports the plaintiff's application to handle the less-than-truckload orders.

Steele's less-than-truckload orders account for approximately 80% of its business, which it transported almost exclusively by its own private carriage until June of 1958, when a labor dispute interfered with such operations. Steele at that time prompted plaintiff to apply for authority to handle this operation as a contract carrier. In June 1958 the Commission granted plaintiff temporary operating authority substantially as requested by him. The service rendered by plaintiff under such authority was found by the trial examiner to be substantially similar to the private carrier operations previously performed by Steele. The contract service rendered by plaintiff to Cain and to Keystone largely involves their sales to Steele, but both are interested in developing their own less-than-truckload business, which plaintiff would handle.

The three canners insist that the only satisfactory alternative to private carriage is contract carriage of the type plaintiff proposes to offer and which he has performed for them under temporary operating authority. Their business is intensely competitive and has a small margin of profit. Most small order accounts operate on small inventories, making it critical that their orders be filed promptly. Further, Steele has found that many of its customers have special unloading times and requirements which must be observed at risk of the loss of that business. Because of these facts and because of the scattered location of the small order customers throughout the 33 states named in plaintiff's application, these three canners insist that they would not be in a competitive position if forced to rely upon common carriers for delivery of less-than-truckload orders. Delays in "interlining" shipments, coupled with what the canners regard as "prohibitive" common carrier less-than-truckload rates, would, they say, place them at a disadvantage as to their competitors, who maintain their own fleets of trucks. The canners intend to abandon their private carriage operations and, in effect, use plaintiff as though he were their shipping department.

While the trial examiner found that some less-than-truckload shipments which require delivery stops for a portion of the freight at one or two points enroute to final destination had been satisfactorily handled by common carrier, the traffic that the three canning companies propose giving plaintiff involves from three to ten stops, with six stops being approximately the average less-than-truckload pooled shipment. This business had not in the past been handled by the protestant common carriers and, say the three shippers, will continue to be handled by private carriage if plaintiff's application is not granted, though the protestant common carriers insist that their experience indicates that they will receive some of this traffic if it is not handled by a contract carrier.

I

The limits of permissible judicial review of the order of the Interstate Commerce Commission here in question are determined by Section 10(e) of the Administrative Procedure Act. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). The appeal is upon the record made before the Commission and its order must be sustained if it is supported by substantial evidence when viewed on the record as a whole and if the action taken is within the scope of its lawful authority. *Universal Camera Corporation* v. *Labor Board*, 340 U.S. 474, 490 (1951). Plaintiff alleges that the order under review lacks substantive support for several findings and conclusions expressed by Division 1 in its report, and further alleges that the report applies a test not permitted by statute.

Our review of the record has convinced us that the plaintiff is correct in these contentions.

II

In declaring the national transportation policy, Congress included the following goals:

> ". . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. . . ." 54 Stat. 899 (1949), 49 U.S.C., preceding § 1 (1958).

We need not decide whether contract motor carriers are a separate "mode" of transportation from common motor carriers to hold, as we do, that the goal of the national transportation policy encompasses all modes and all carriers subject to regulation.

A contract carrier by motor vehicle is defined by statute as:

> ". . . any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . (other than common carriers), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." 71 Stat. 411 (1957), as amended, 49 U.S.C § 303(a)(15) (1958).

The Commission found that plaintiff would fit this definition, but upon its review of the entire case concluded:

> "It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. *See J-T Transport, supra.*
>
> "There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied."

The applicable section of the Interstate Commerce Act provides:

"Subject to . . . (the provision against holding both a common carrier certificate and a contract carrier permit), a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper and (5) the changing character of that shipper's requirements." 71 Stat. 411 (1957), 49 U.S.C. § 309(b) (1958).

There is no contention that plaintiff has not demonstrated his fitness and ability to meet the first two requirements for the issuance of a permit, and as is said in the Commission's opinion, the fifth matter for consideration is not involved. As shown above, the Commission found that the granting of the permit would have an adverse effect upon the protesting common carriers because such carriers could efficiently handle the business, and there was no adequate showing that the supporting shippers had a real need for the proposed service. Thus, the third and fourth criteria enumerated in the act are the only ones involved, and it is upon these conclusions that the Commission denied plaintiff a permit as not being consistent with the public interest and the national transportation policy.

The statutory enumeration of factors for Commission consideration in determining consistency with the public interest and national transportation policy specifically includes the effect that a denial of the permit would have upon the supporting shippers, but as interpreted by the Commission.

> "... whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements . . ."

We find no authority for limiting the inquiry as to the effect of a denial of a permit to a mere inquiry as to the adequacy of presently available service. Indeed, as applied by the Commission in this case, there is no distinction between this test and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate.

Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; the record, the findings of the examiner, and the specific findings of fact stated by Division 1 in its report all indicate the contrary—the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized. It does not do to say that the record is devoid of any substantial showing of dissatisfaction by the shippers with existing service because the complaints are not substantiated by reference to specific instances, or to hold that the shippers failed to show that they had been unable to obtain reasonably adequate service upon request because existing common carriers, other than Jones, had been almost completely untried in recent

years. The record clearly reveals that the shippers, particularly Steele Canning Company, are reasonably familiar with the services, including less-than-truckload rates, of the protestant carriers, and have not used them for the traffic in question because these services are inadequate.

Further, the "adequacy of existing service" test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act. In 1957 the Commission proposed to Congress several changes in the Act to enable it to better regulate contract carriers. As proposed, § 203 (a)(15) of the Act (49 U.S.C. § 303(a)(15)) would have defined the term contract carrier by motor vehicle as meaning:

> ". . . any person which engaged in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . ., under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers."

Section 209(b) (49 U.S.C. § 309(b)) would have been changed to insert the requirement "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." The amendment of the Interstate Commerce Act does not contain such language, however, and as amended by Public Law 85-163, 71 Stat. 411, the two sections read as previously quoted in this opinion.

Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered

by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See *J-T Transport Co., Inc., Extension—Columbus, Ohio,* 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

We do not believe that there is any difference between the "willingness and ability" test deleted by Congress from the bill proposed by the Commission and the "adequacy of service" test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the "willingness and ability" test:

> "Applicant argues in his reply (referring to the 1957 amendments) that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11185 (Sub.-No. 100) *J-T Transport, Inc., Extension—Columbus, Ohio, M.C.C.,* decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications."

The decision of the Commission in the J-T Transport, Inc. case was attacked in a proceeding instituted by that applicant in the district court for the Western District of Missouri, Western Division, in the case of *J-T Transport Co., Inc.* v. *United States of America and Interstate Commerce Commission.* The three-judge court in that case handed down its opinion August 9, 1960, Fed. Supp. , setting aside the order of the Commission for wrongfully

applying the new criteria prescribed by the 1957 amendment to the Interstate Commerce Act. This case was one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier. In that case, the court discusses exhaustively the legislative history of the 1957 amendments and concludes at page of Fed. Supp.

> "The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing service is adequate, the effect on existing protesting common carrier services is adverse. . . . The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section."

In this case, the only evidence of the adequacy of existing service to meet the transportation requirements of the supporting shippers came from the testimony of common carriers that they were willing and able to serve, though they had not been called upon by the shippers to do so in recent years as to the traffic in question; all the other testimony was to the effect that the existing service was considered inadequate by the shippers.

We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper.

As the Court said in overruling the Commission in the *J-T Transport case:*

> "Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, 'The permit shall be issued, unless an existing carrier will be adversely affected.' It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper distribution of the application."

III

Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national transportation policy is to promote "economical" service.

We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need

not be considered perhaps, but evidence of efficient operation must be heeded.

IV

In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.

Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. As the Court said in the *J-T Transport* case:

> "... a finding by the Commission that existing common carrier service is 'adequate to meet the reasonable transportation needs' of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is 'designed to meet the *distinct need* of each individual customer.' While existing *specialized services* of common carriers may very well be adequate to supply the shipper's '*reasonable transportation needs*', that existing service may not in fact meet the distinct or specific need of the supporting shipper."

V

The orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 shall be set aside and their enforcement enjoined. The cause is remanded to the Interstate Commerce

Commission for such further proceedings in conformity with this opinion as may be proper.

APPENDIX "C"

Decision

INTERSTATE COMMERCE COMMISSION

No. MC-117568

TAM FERTILIZER CARRIERS, INC., CONTRACT CARRIER APPLICATION

Decided December 7, 1960

Upon reconsideration, findings in prior report, M.C.C. , decided May 11, 1959, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities from and to certain points and areas in nine States for named shippers found to be consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By application filed August 6, 1958, as amended, Tam Fertilizer Carriers, Inc., of Corning, Ark., seeks a permit authorizing operation, in interstate or foreign commerce, as a contact carrier by motor vehicle, over irregular routes, in a service restricted against the use of tank vehicles, and further restricted to transportation on behalf of Ark-Mo Plant Food Company, Inc., of Walport, Ark., Missouri Plant Food Company, Inc., of Sikeston, Mo., and Blytheville Plant Food Company, Inc., of Blytheville, Ark., hereinafter

called Ark-Mo, Missouri Food, and Blytheville Food, respectively, of (1) fertilizer and fertilizer materials and compounds (a) from Walport (near Walnut Ridge, Ark.,) to points in Illinois, Tennessee, Mississippi, Louisiana, Texas, New Mexico, Kentucky, and Missouri, (b) from Blytheville to points in Tennessee and Missouri, (c) from Sikeston to points in Illinois, Tennessee, Kentucky, and Arkansas, and (d) from Pascagoula, Miss., to points in Tennessee, Texas, New Mexico, and Arkansas; (2) potash from points in New Mexico to Pascagoula and points in Arkansas and Missouri; (3) ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, (a) from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi to Walport, Blytheville, and Sikeston, and (b) from the port of Harlingen, Tex., to points in Texas; (4) ammonium sulphate (a) from points in Kentucky to Walport and Sikeston, and (b) in bulk from Fredericktown, Mo., to Walport; (5) nitrate of soda from points in Louisiana to Walport and Blytheville; (6) bags (a) from St. Louis, Mo., to Walport and (b) from points in Arkansas to Sikeston; and (7) agricultural insecticides from points in Texas, Louisiana, Mississippi, and Tennessee (except Knoxville), to Walport. L. A. Tucker Truck Lines, Incorporated, East Texas Motor Freight Lines, Inc., Herrin Transportation Company, Jones Truck Lines, Inc., Gordon Hart Truck Lines, and Be-Mac Transport Company, Inc., and certain rail carriers oppose the application.

In the prior report herein, M.C.C. , decided May 11, 1959, Division 1 found that operation by applicant, as a contract carrier by motor vehicle, substantially to the same extent set forth in our findings below, would be consistent with the public interest and the national transportation policy, and authorized the issuance of a permit to applicant. On December 30, 1959, upon consideration of the record herein, of a joint petition of rail carriers, and of

a reply by applicant, we reopened the proceeding for reconsideration on the present record.

In their petition rail carriers ask that any authority granted applicant be limited to outbound service from shippers' plants to off-rail points, arguing that all three plants herein are served by rail carriers which have, over the years, satisfactorily handled nearly all of the inbound fertilizer materials thereto. They further contend that the authority granted in the prior report is inconsistent with the position of the supporting shippers which state (1) that rail carriers will continue to handle 85 percent of their inbound traffic, and (2) that their real need for service concerns the transportation of fertilizer to off-rail points such as farm-sites during the planting season. In reply applicant points out that none of the motor carrier protestants filed petitions and concludes therefrom that their interest in this traffic is minimal. It argues that it was organized by shippers for the express purpose of engaging in the operations which they previously performed themselves; that none of shippers' outbound traffic moves directly to rail points; that, in any event, the rails will continue to participate in this traffic to the same extent they have in the past; and that little or no traffic will be diverted from existing carriers if this application is granted. It urges that the application be granted to the extent set forth in the prior report. The facts of record are set forth adequately in the prior report but will be restated here to the extent necessary for a clear understanding of the issues raised on petition.

Applicant is a recently-formed corporation organized by the supporting shippers which are themselves commonly controlled. It holds no authority from this Commission. Prior to the organization of applicant, each shipper herein operated in private carriage transporting the products which it manufactures as well as the commodities in which it deals. On occasion, each performed some transportation

service for the others, but such operations were discontinued upon notification by our field representative that these operations required authority. As a consequence of this cessation of operations, shippers were without motor service, and organized applicant to provide the service that they themselves had been providing. Specifically, the purpose of this application is to provide shippers with an outbound motor service for the delivery of manufactured products, and to furnish these companies with an inbound service transporting raw materials. In the outbound service, fertilizer, fertilizer materials, and fertilizer compounds will move to shippers' dealers and customers, and in the inbound service movement will be mainly from places of manufacture of the various fertilzer ingredients to the three plants here considered. If this application is granted, shippers will assign to applicant certain motor equipment they presently own as a part of their contribution to its capital assets. If the application is denied, they intend to continue their private carriage operations because they believe that it is essential that they control the deliveries to the customers. As the fertilizer business grows, applicant intends to purchase additional equipment as necessary, but in any event will exclusively dedicate equipment to the use of the supporting shippers herein.

Ark-Mo, Missouri Food, and Blytheville Food support the application. The first two are engaged in the manufacture, sale, and distribution of fertilizer, fertilizer materials, and fertilizer compounds, whereas Blytheville Food is engaged only in the warehousing, sale, and distribution of these commodities. They all have customers throughout the considered destination area to whom they ship substantial volumes of fertilizer and fertilizer compounds from their plants at Sikeston and Walport, and from facilities at Blytheville, Pascagoula, and Harlingen. For the most part these customers are individual farmers or commercial dealers, and shippers express a need for service, principally but not limited to farm sites and off-rail points, on short

notice, during the annual planting season, and to a lesser extent during the remainder of the year. Such service has been available heretofore from their recently discontinued private carrier operations, and they support applicant here in the anticipation of having available a for-hire carrier offering the same type of service. Shippers point out that because of the competitive nature of their business, reliable motor carrier service is essential to enable them to effectively cope with their competitors which may have such service available to them, and add that they have found from experience that their sales are in direct proportion to the speed and dependability of the service they can provide. On outbound traffic shippers have made no use of rail carriers. They cited one instance where an unspecified motor common carrier was unable to provide as rapid a service as they desired on an outbound movement. While they admit that they are not wholly familiar with the services offered by all of the existing motor carriers, shippers are convinced that these carriers are not in a position to provide the service needed, and in fact believe that many of them would actually turn down this traffic were it offered them.

Inbound, shippers seek a motor carrier service to supplement the available rail services which would continue to handle much of this traffic, in the transporation of raw materials and ingredients used in the manufacture of fertilizer. They point out that the return movements proposed by applicant in the transportation of ingredients and raw materials would be a continuation of their own past practices in private carrier operations.

The opposing motor carriers are general-commodity carriers which operate over networks of regular routes in the area under consideration. Their authority is detailed in the prior report and will not be repeated here. It is sufficient to say that they are willing and anxious to handle this traffic to the extent of their authorities, but generally are of course limited to service at points along their routes.

The St. Louis-San Francisco Railway Company provides service to the plant sites at Blytheville, Walport, and Sikeston, and interlines with other rail carriers serving origins and destinations here involved. The Illinois Central Railroad Company has participated in handling inbound traffic to Walport and Sikeston, and The Atchison, Topeka and Santa Fe Railway Company has handled an appreciable tonnage of potash originating in New Mexico and destined to points in Missouri and Arkansas. The rail carriers fear that a grant of authority here will divert traffic from them and further decrease their depleting revenues.

The evidence discloses that applicant, while it will dedicate its equipment to the exclusive use of the three supporting shippers rather than to that of each shipper, will provide a service meeting the distinct needs of these shippers. Thus, it appears that applicant's proposed operations are those of a contract carrier as defined in section 203(a)(15) of the Interstate Commerce Act, as amended. However, an applicant for authority as a contract carrier is entitled to a grant of authority only upon our finding that its proposed operations will be consistent with the public interest and the national transportation policy. In making such a determination, we are required to give consideration to, among other things, the following factors enumerated in section 209(b) of the act, as amended: (1) The number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority on the services of protesting carriers, (4) the effect of a denial on applicant and its shippers, and (5) the changing character of the shipper's requirements.

Bearing these factors in mind, we note that we have here a situation wherein an applicant, a recently organized corporation, is seeking to provide for three supporting shippers a service which the latter provided in the past in private carriage operations. These shippers, which com-

monly control applicant, and are themselves under common control, are engaged in the sale, distribution, or manufacture of various fertilizers and fertilizer compounds, and not only require the services of a carrier to move their output to consumers, but also require an inbound service to handle the ingredients used in the manufacture of fertilizer. On their outbound traffic shippers require the services of a carrier which can meet their complete needs by furnishing equipment immediately on short notice and by providing farm site or store-door deliveries. Protestants, being regular-route motor common carriers or rail carriers, cannot respond to this need particularly as to the destination points which may be off their routes. Furthermore, they have not participated in this outbound traffic in the past and thus will not be adversely affected by a grant of operating authority herein. Inbound, rail carriers have been used on much of this freight, and will continue to be used as extensively as heretofore. As on the outbound traffic, protesting motor carriers cannot provide the needed service, because of the territorial limitations in their certificates and they have not participated in the movement of this freight in the past. It is clear then, that what shippers need is a service to supplant that provided in the past by private carriage in the transportation of raw materials and ingredients employed in the manufacture of fertilizer and fertilizer compounds. Thus it is plain that shippers' requirements are for a transportation service closely integrated with their operations and one which would be closely akin to the private carriage operations heretofore used. In the circumstances here, the close relationship between shippers and applicant is not objectionable, for the proposed service is that of a contract carrier. The very nature of such service, as well as that herein, contemplates a personalized and dedicated service by a carrier for a shipper or limited number of shippers and a concomitant close relationship between shipper and carrier. We, therefore, are of the opinion that applicant should be permitted

to provide the proposed service to the extent authorized in the findings below.

There remains another matter. During the time that the supporting shippers were engaged in so-called "private" carrier operations, they performed certain unauthorized transportation by providing service for each other. These operations were, in our opinion, performed in ignorance of and without any intent to disregard the provisions of the Interstate Commerce Act or our rules and regulations, and thus do not warrant a denial of the application or a negative finding as to applicant's fitness. Applicant is admonished to become fully acquainted with our rules and regulations, to abide by them, and to refrain from providing any service not authorized by its outstanding authority.

On reconsideration, we find that operation by applicant, in interstate of foreign commerce, as a contract carrier by motor vehicle, over irregular routes, under a continuing contract or contracts with persons (as defined in section 203(a)(1) of the Interstate Commerce Act) hereinafter named, for the transportation of commodities, except in tank vehicles, as follows:

A. With Ark-Mo Plant Food Company, Inc., of Walport, Ark.,

(1) of fertilizer and fertilizer materials and compounds from Walport, (near Walnut Ridge), Ark., to points in Illinois, Tennessee, Mississippi, Louisiana, Texas, New Mexico, Kentucky, and Missouri;

(2) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi to Walport, Ark.,

(3) of ammonium sulphate,

(a) from points in Kentucky to Walport, Ark.;

(b) in bulk, from Fredericktown, Mo., to Walport, Ark.;

(4) of nitrate of soda from points in Louisiana to Walport, Ark.; and

(5) of agricultural insecticides from points in Texas, Louisiana, Mississippi, and Tennessee (except Knoxville), to Walport, Ark.;

B. With Missouri Plant Food Company at Sikeston, Mo.,

(1) of fertilizer and fertilizer materials and compounds from Sikeston, Mo., to points in Illinois, Tennessee, Kentucky, and Arkansas;

(2) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi, to Sikeston, Mo.; and

(3) of ammonium sulphate from points in Kentucky to Sikeston, Mo.;

C. With Blytheville Plant Food Company, Inc., of Blytheville, Ark.,

(1) of fertilizer and fertilizer materials and compounds from Blytheville, Ark., to points in Tennessee and Missouri;

(2) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi to Blytheville, Ark.; and

(3) of nitrate of soda from points in Louisiana to Blytheville, Ark.; and

D. With Ark-Mo Plant Food Company, Inc., Missouri Plant Food Company, Inc., and Blytheville Plant Food Company, Inc.,

(1) of fertilizer and fertilizer materials and compounds from Pascagoula, Miss., to points in Tennessee, Texas, New Mexico, and Arkansas;

(2) of potash from points in New Mexico to Pascagoula, Miss., and points in Arkansas and Missouri; and

(3) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from the Port of Harlingen, Tex., to points in Texas,

will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a permit authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215, 218, and 221(c) of the Interstate Commerce Act, with our rules and regulations thereunder, and with the requirements established in *Contracts of Contract Carriers*, 1 M.C.C. 628, within the time specified in the order entered concurrently herein, an appropriate permit will be issued.

An appropriate order will be entered.

COMMISSIONER FREAS, whom COMMISSIONERS TUGGLE, MURPHY and HERRING join, dissenting:

In my opinion, the instant application is an attempt by three private carriers to invade the field of for-hire transportation in a manner inconsistent with the public interest in the maintenance of a strong public transportation system. While there can be no objection to bona fide private carriage by each shipper, a grant would constitute a device whereby these commonly controlled shippers would deprive the rails of some inbound traffic in order to insure

profitable outbound operations for each other. Rail service has proven satisfactory and shippers are admittedly unfamiliar with the services offered by all the existing motor carriers. I would deny the application.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of December, A. D. 1960.

No. MC-117568

TAM FERTILIZER CARRIERS, INC., CONTRACT CARRIER APPLICATION

It appearing, That on May 11, 1959, the Commission, division 1, made and filed its report, M.C.C. , in the above entitled proceeding, granting applicant authority to conduct certain operations in interstate or foreign commerce as a contract carrier by motor vehicle, and denying the application in all other respects;

It further appearing, That upon consideration of the record, of a joint petition for reconsideration filed by rail protestants, and of applicant's reply thereto, by order of December 30, 1959, the proceeding was reopened for reconsideration on the present record;

It further appearing, That reconsideration of the matters and things involved has been given, and that the Commission, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the said report of May 11, 1959, are hereby referred to and made a part hereof:

It is ordered, That said application, except to the extent granted in the said report on reconsideration, be and it is hereby, denied.

And it is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 218, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report on reconsideration shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 517

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

No. 518

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

REPLY OF APPELLANTS U.S.A.C. TRANSPORT, INC., THE REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND THE COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., TO MOTIONS TO AFFIRM OR DISMISS

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Attorneys for Appellants

February 6, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 563

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

No. 564

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

REPLY OF APPELLANTS U.S.A.C. TRANSPORT, INC., THE REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND THE COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., TO MOTIONS TO AFFIRM OR DISMISS

While appellees urge that "no substantial question"[1] has been presented for the decision of this Court, they nevertheless admit severally that the legislation to be interpreted is "important"[2] and that

[1] Motion for J-T Transport, p. 47, Motion for Contract Carrier Conference, p. 11.

[2] Motion for Contract Carrier Conference, p. 10.

the questions here involved "are of the utmost importance."[3]

So crucial was the situation giving rise to the legislation now at issue that Congress gave it preferred attention. The decision below obviously jeopardizes the future of freight service by highway common carriers. If this result is the lawful effect of the 1957 contract carrier amendments to the Interstate Commerce Act, we submit that this Court should so declare. If, on the other hand, the court below erred, its error should be corrected promptly and these important questions in transportation law be put at rest.

These appellants share the view of the United States in its Memorandum addressed to the Court, "that the appeals present issues of public importance" and that "the Court should note probable jurisdiction of the appeals."[4]

Respectfully submitted,

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February 6, 1961

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[3] Motion for J-T Transport, p. 12.

[4] Memorandum for the United States, p. 2.

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for appellants U.S.A.C. Transport, Inc., Common Carrier Conference —Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of February, 1961, I served copies of the foregoing Reply on the several parties as follows:

1. On the United States, by mailing copies, duly addressed and postage prepaid, to Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., W. Wallace Kirkpatrick, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., and Edward L. Scheufler, United States Attorney, Kansas City, Missouri, air mail postage prepaid.

2. On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, and by delivering a copy to James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, at their offices in Washington, D. C.

3. On the J-T Transport Company, Inc., appellee herein, by mailing copies in duly addressed envelopes, air mail postage prepaid, to James W. Wrape, Esq., and Glenn M. Elliott, Esq., Wrape and Hernly, 2111 Sterick Building, Memphis, Tennessee, and to John E. Park, Esq., 1007 Bryant Building, Kansas City, Missouri, it attorneys.

4. On other appellees herein, by mailing copies in duly addressed envelopes, to their respective attorneys of record, as follows:

With first class postage prepaid, to Clarence D. Todd, Esq., and Charles F. Riddle, Esq., 1825 Jefferson Place, N. W., Washington 6, D. C., and with air mail postage prepaid, to Lowell L. Knipmeyer, Esq., Waltower Building, Kansas City 6, Missouri, Attorneys for Contract Carrier Conference of American Trucking Associations, Inc.

With air mail postage prepaid, to John H. Kreamer, Esq., 1007 Bryant Building, Kansas City, Missouri, Attorney for Aerospace Industries Association of America, Inc.

/s/ ROLAND RICE

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No. 17

In the Supreme Court of the United States

OCTOBER TERM, 1961

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI—WESTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

ROBERT W. GIFFORD,
Special Counsel,
E. FRANKLIN TAYLOR, JR.,
Attorney, General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 17

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI—WESTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 160–179) is reported at 185 F. Supp. 838. The reports of the Interstate Commerce Commission are printed at 74 M.C.C. 324 (Division 1) (R. 22–27) and 79 M.C.C. 695 (entire Commission) (R. 29–52).[1]

[1] Each of these reports involved two motor carrier application proceedings, namely, Docket No. MC–11185 (Sub-No. 100), entitled *J–T Transport Co., Inc., Extension—Columbus, Ohio* and Docket No. MC–11185 (Sub-No. 102), entitled *J–T Transport Co., Inc., Extension—Indianapolis, Ind.* The Commission's orders in only the second, or Sub-No. 102 docket, are involved in this case.

JURISDICTION

The judgment of the district court was entered on August 9, 1960 (R. 159). The Interstate Commerce Commission filed its notice of appeal on October 6, 1960 (R. 180–183), and probable jurisdiction was noted on February 20, 1961 (R. 186). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether, in passing upon an application for a contract carrier permit, the Interstate Commerce Commission is precluded by the 1957 amendments to sections 203(a)(15) and 209(b) of the Interstate Commerce Act from giving any consideration to an affirmative showing by a protesting common carrier that it is authorized, able and willing to provide a service adequate to fulfill the transportation requirements of the shipper supporting the application.

2. Whether, in determining "the effect which denying the permit would have upon the * * * shipper" as required by section 209(b), the Commission gave improper consideration to the willingness and ability of the protesting common carrier to perform the required service and failed to make adequate findings supported by substantial evidence.

3. Whether, in applying the statutory standard of consistency with the public interest and the national transportation policy and the criterion of "the effect which granting the permit would have upon the services of the protesting carriers", the Commission erred in concluding that granting the permit would be inimical to the preservation of sound economic con-

ditions in the transportation industry and would adversely affect the services of the protesting carrier by withdrawing potential traffic which the protesting carrier can handle adequately and should be given the opportunity to handle before additional authority is granted.

STATUTES INVOLVED

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901 and 1001); section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong.); and section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–412, Public Law 85–163, 85th Cong.) are set forth in the Appendix.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court, setting aside an order of the Interstate Commerce Commission, entered on June 15, 1959, denying an application of J–T Transport Company for a contract carrier extension-of-service permit.

Prior to the Commission hearing held in this case on May 22, 1957, there had been issued to the appellee J–T Transport Company, Inc., of Kansas City, Missouri, sixteen different permits[2] as a contract carrier by

[2] Issued over the period from July 6, 1953, to January 17, 1957, in J–T's Dockets Nos. MC–11185, Sub-Nos. 37, 61, 64, 69, 72, 73, 76, 79, 80, 82, 84, 85, 91, 92, and 94 (Applicant's Exhibit No. 1 to the transcript of testimony, being part of Plaintiffs' Exhibit "A" received in evidence at the hearing on February 15, 1960, before the court below).

motor vehicle under section 209(b) of the Interstate Commerce Act, authorizing transportation by it of commodities described generally as uncrated aircraft components and assemblies, utilized by J–T for nine aircraft manufacturers, between various points in the United States, principally between certain points in Midwestern and Western States. By application filed on March 14, 1957, in J–T's Docket No. MC–11185 (Sub-No. 102), as amended on April 12, 1958, an extension-of-service permit was sought for operation as a contract carrier of "aircraft landing-gear bulkheads, uncrated, requiring special handling and special equipment because of their fragile nature," over irregular routes from Indianapolis, Ind., to Wichita, Kansas.

At the hearing held on this application, the Wichita Division of Boeing Airplane Company, consignee of the proposed traffic, supported the grant of the proposed permit. A manufacturer at Indianapolis, H & B American Machine Company, makes landing-gear bulkheads of outsize dimensions for Boeing, which the latter installs, upon delivery to it, in B–52 airplanes being manufactured at Wichita for the United States Air Force (R. 68, 79, 84). Until the grant of temporary authority on February 8, 1957,[3] to J–T, these bulkheads had been transported for about 20 months prior to that date from Indianapolis to Wichita by rail carriers, in returnable crates in flat cars (R. 87).

[3] The testimony was that the temporary authority was issued April 9, 1957 (R. 65, 76), but the Commission's records show that the correct date should be February 8, 1957.

U.S.A.C. Transport, Inc., of Detroit, Mich., one of the protestants against the grant of the application, is a motor common carrier which has held a certificate of public convenience and necessity from the Commission since January 18, 1950, in its Docket No. MC–108068 (Sub-No. 12), to transport, *inter alia*, "aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile nature," over irregular routes between points in the United States lying east of the Mississippi River and points lying west of that River, which authority would embrace the transportation from Indianapolis to Wichita proposed by appellee J–T (Ex. 16, R. 148, 150; R. 111–112). This protestant has specialized in serving the aircraft industry for many years (R. 111, 113, 117; Ex. 16, R. 148, 149).

Among its 18 terminals throughout the country, U.S.A.C. maintains one at Indianapolis, the origin point of the shipments of bulkheads, where its equipment has not been fully utilized (R. 112, 115–117). It has in the past modified its equipment and has tailored its service to meet the specific transportation requirements of aircraft manufacturers, and it would meet Boeing's requirements if it were offered the Indianapolis-Wichita traffic (R. 112–115, 117–119). Although Boeing knew of, and had previously used the authorized common carrier services of U.S.A.C., it did not request that carrier to supply equipment for the Indianapolis-to-Wichita movement (R. 101, 103, 104–105, 117). At the hearing, Boeing's witness testified that it had an unsatisfactory experience with a load hauled by U.S.A.C. in 1953, although he was

unable to say whether the damage incurred was the fault of the shipper or the carrier (R. 101). The examiner shut off cross examination for the reason that the incident was too remote—and U.S.A.C. has gone under new management since then (Ex. 16, R. 148, 149).

The hearing examiner recommended a grant of J-T's Sub 102 application. Following exceptions filed to that recommended report, and reply, the Commission's Division 1, on January 31, 1958, issued its report and order disapproving the examiner's recommendations and denying the Sub 102 application. Reconsideration and oral argument were denied by order of July 25, 1958, by the entire Commission. Upon J-T's second petition for reconsideration, the entire Commission, by order of October 16, 1958, reopened the Sub 102 proceeding for reconsideration and for the issuance of a further report and order. On June 15, 1959, the Commission issued its report on reconsideration and order, again denying the Sub 102 application.

On August 21, 1959, J-T instituted an action in the District Court to set aside the reports and orders of Division 1 and of the Commission entered on January 31, 1958, and June 15, 1959, respectively, denying the Sub 102 application. On August 9, 1960, the District Court rendered its opinion and judgment setting aside the Commission's orders as being unlawful and void, and remanding the cause to the Commission for further proceedings consistent with such opinion.

SUMMARY OF ARGUMENT

I

A. The Motor Carrier Act was enacted in 1935 as a part of a complete and coordinated program of legislation recommended by the Federal Coordinator of Transportation. In view of the unstable economic conditions in the motor carrier industry, "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition * * *." *American Trucking Associations* v. *United States*, 344 U.S. 298, 312–313. Motor carrier regulation has as its underlying purpose the promotion and protection of adequate and efficient common carrier service.

B. Both before and after the 1957 amendment to section 209(b) of the Interstate Commerce Act, the standard governing the grant or denial of applications for contract carrier permits has been whether the proposed operation "will be consistent with the public interest and the national transportation policy." Prior to the passage of 1957 amendments to section 203(a)(15) (which defines the term "contract carrier" by motor vehicle) and section 209(b), the Commission had consistently attached crucial importance to the availability of adequate common carrier service in passing on applications for contract carrier permits; and, in order to foster sound economic conditions in the motor carrier industry, it had applied the principle that existing motor carriers should normally be accorded the right to handle all traffic which they can handle adequately, efficiently, and economically in the

territory served by them, as against any persons seeking to enter the field.

This practice and principle has received judicial approval. *Wilson* v. *United States,* 114 F. Supp. 814 (W.D. Mo. 1953); *Bass* v. *United States,* 163 F. Supp. 1 (W.D. Va. 1958), affirmed 358 U.S. 333, rehearing denied, 359 U.S. 956; cf., *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 90. And, in cases involving motor carrier unifications under section 5(2) of the Interstate Commerce Act, the courts have repeatedly upheld Commission decisions withholding approval of proposed unifications which would create new competitive services, on the grounds that the evidence failed to show that the resulting services would supply any needs which could not be adequately met by existing carriers. *E.g., Ratner* v. *United States,* 162 F. Supp. 518, 519 (S.D. Ill. 1957), affirmed 356 U.S. 368; *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J. 1951), affirmed 343 U.S. 944.

Designed to curb the destructive effects of overcompetition and, thereby, to foster sound economic conditions in transportation, we submit that the Commission practice was, and is, fully responsive to the Congressional purpose in enacting motor carrier regulation and an appropriate implementation of the National Transportation Policy.

C. The Commission's power and duty to consider a showing by a protesting common carrier that it is able and willing to provide service adequate to meet the transportation needs of the shipper supporting the contract carrier application was not impaired by the 1957 amendments.

1. When section 209(b) was amended in August of 1957, Congress retained the governing standard of consistency with the public interest and the National Transportation Policy but added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers and [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements.

In apparently holding that the Commission was, thereby, precluded from considering the availability and adequacy of common carrier service (R. 173, 176), the district court erred. The availability of common carrier service and its adequacy to fulfill the transportation requirements of the supporting shipper are relevant to, and implicit in, the third and fourth of the above criteria. Moreover, the retention of the same governing standard is a clear indication that the availability of adequate service is a significant factor after passage of the amendment, as it was before. Our position here finds support in the language of this Court referring to section 209(b), as amended, in *American Trucking Associations* v. *United States*, 364 U.S. 1, 13–14. It is also

supported by a recent decision of a three-judge district court in *Alexandria, Barcroft and Washington Transit Co.* v. *United States,* Civil No. 2023, E.D. Va., opinion dated July 10, 1961, judgment entered August 14, 1961, 14 Fed. Carr. Cas., par. 81, 395.

2. The impetus for the 1957 amendments was this Court's decision in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956), which appeared to make possible the proliferation of contract carrier services in competition with common carriers. They were initiated by the Commission to enable it to limit the number of persons whom a contract carrier may service without securing additional authority. S. Rep. No. 703, 85th Cong., 1st Sess. (1957), pp. 1, 6.

Certain specific language in the proposed legislation encountered strong opposition, notably by the Contract Carrier Conference, an appellee here. This was language which would have amended section 203(a)(15) to define contract carriage as, *inter alia,* transportation service "not provided by common carriers," and would have amended section 209(b) to require a showing, *inter alia,* "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." S. 1384, 85th Cong., 1st Sess. (1957).

Deferring to the opposition, the Commission agreed to withdraw the objectionable language in section 209(b) "because of the very difficult burden of proof that would be imposed upon applicants." *Surface Transportation—Scope of Authority—ICC,* Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee on S.

1384, etc., 85th Cong., 1st Sess. (1957), pp. 23–24. It also agreed to the elimination of the objectionable language in the definition as "not necessary to carry out the purpose of the bill" (*id.* at 43–44). Testimony of the spokesman for the Contract Carrier Conference shows that there was no belief that the eliminations or the addition of the five criteria in section 209(b), as finally enacted, removed the availability of adequate common carrier service as an appropriate factor for consideration by the Commission (*id.* at 299–300). The fact that the final bill had the support of the railroads, the common carriers, and the Commission is evidence that there was no intent to change the law so as to enhance the economic position of the contract carriers at the expense of common carriage. Moreover, the Senate Committee articulated the public interest in a "stable and adequate system of common carriage" in recommending passage. S. Rep. No. 703, *supra*, at 7.

Strong support for our position is found in contemporaneous legislation amending 49 U.S.C. § 1010(d) to lift a prohibition against the Commission denying a freight forwarder permit on the ground that the service will compete with existing forwarder service. The reports of the Senate and House Committees (the same committees which handled the amendments to sections 203(a)(15) and 209(b)) show their awareness of the Commission's treatment of the existence of adequate service and of its importance in motor carrier regulation. See S. Rep. No. 542, 85th Cong., 1st Sess. (1957), pp. 2–3; H.R. Rep. No. 880, pp. 3–4.

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Nowhere in the legislative history of the 1957 amendments is there disapproval or even criticism of the Commission's practice of attaching important weight to the existence of adequate service. We submit that the Commission must receive and consider affirmative evidence as to this factor when it is offered by protesting carriers.

II

A. In stating that the Commission has entirely ignored the affirmative evidence of Boeing's specific needs, that no consideration was given to special services which in fact could not be supplied by a common carrier, and that the Commission has not made appropriate findings respecting the adequacy of the existing service to meet Boeing's distinct needs (R. 177), the district court misconceived the nature of the Commission's findings and assumed the administrative function of evaluating the evidence. We assert that the Commission's report shows on its face that it carefully considered Boeing's needs and the nature and extent of the service available from the protesting common carriers, and that it made entirely adequate findings (R. 32–33, 46–47, 49). This is demonstrated later in this brief, *infra*, at 46–52, where we also show that the findings of fact are amply supported by the record.

We further assert, and demonstrate at the same place, that the district court erred in holding (R. 170) that the Commission required the applicant to carry the burden of showing that existing services are inadequate. The Commission clearly based its con-

clusion on the affirmative showing made by the protesting common carrier, U.S.A.C., that it was authorized to serve the points involved, was experienced in the performance of the highly specialized service of transporting aircrafts and aircraft parts, and was fully able and willing to do all that was necessary to meet the shipper's requirements.

B. In the district court's view, the Commission based its determination of the effect of granting the permit on the services of protesting carriers on an improper presumption, and the Commission is only entitled to consider the diversion of substantial traffic which the protestant is presently transporting as constituting such adverse effect (R. 174, 176–177). We think that a reading of the full discussion in its report (R. 42–44, 45–46), reveals that the Commission did not reach its conclusion respecting the effect of granting the permit on protesting carriers presumptively. Rather, the report shows that the Commission's conclusion is the product of its present expert judgment as to the requirements of the public interest in the light of the provisions of the National Transportation Policy.

In our opinion, the issue here is whether the Commission abused its discretion and unlawfully administered the statute in concluding that, where existing common carrier service is adequate to meet the shipper's needs, granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting common carrier by withdrawing potential traffic which it should be given the oppor-

tunity to handle before an additional service is authorized. In the final analysis, the question is whether the Commission's report reflects a permissible judgment in light of the objectives of motor carrier regulation and the provisions of the National Transportation Policy. We urge that the Commission must be permitted to take a broader view of the requirements of the public interest than the district court's opinion would allow if it is to play its proper role in regulating the motor carrier industry so as to promote sound economic conditions and to develop and preserve a transportation system adequate to meet the needs of our growing economy.

ARGUMENT

I. THE EXISTENCE OF AN AUTHORIZED COMMON CARRIER ABLE AND WILLING TO PROVIDE SERVICE ADEQUATE TO FULFILL THE TRANSPORTATION REQUIREMENTS OF THE SUPPORTING SHIPPER IS A RELEVANT FACTOR WHICH THE COMMISSION HAS THE POWER AND DUTY TO CONSIDER IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT PURSUANT TO SECTION 209(B) OF THE INTERSTATE COMMERCE ACT

Both before and after the 1957 amendment to section 209(b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), the standard governing the grant or denial of applications for contract carrier permits has been whether the proposed operation "will be consistent with the public interest and the national transportation policy." Prior to the enactment of the 1957 amendments, the Commission consistently attached crucial importance to the availability of adequate common carrier service. We contend below that the

availability of adequate common carrier service remains a crucial factor which the Commission has the power and duty to consider in passing upon such applications.

We show that the Commission's practice in this regard accords with the regulatory purposes of the Motor Carrier Act and is an appropriate implementation of pertinent provisions of the National Transportation Policy; that it has received judicial approval both before and after the 1957 amendments; that the availability of adequate common carrier service is relevant to specific criteria which the amendments to section 209(b) require the Commission to consider, as well as to the retained governing standard; and that the history of the 1957 amendments shows that Congress did not intend or contemplate a prohibition against Commission consideration of a showing by protesting common carriers that they are able and willing to render adequate service.

A. THE UNDERLYING PURPOSE OF THE MOTOR CARRIER ACT IS TO PROMOTE AND PROTECT ADEQUATE AND EFFICIENT COMMON CARRIER SERVICE, AND THE REGULATION OF CONTRACT CARRIERS WAS DESIGNED WITH THAT END IN VIEW

The Motor Carrier Act was enacted in 1935 as "a part of a complete and coordinated program of legislation * * * recommended by the Federal Coordinator of Transportation." S. Rep. 482, 74th Congress, 1st Sess., p. 3; H.R. Rep. 1645, 74th Congress, 1st Sess., p. 5. As noted in *American Trucking Associations* v. *United States*, 344 U.S. 298, 312–313, Congress, in 1935, had before it an industry which "was unstable economically, dominated by ease of competi-

tive entry and a fluid rate picture." And to remedy the chaotic condition, "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition * * *."

Reference to the Report of the Federal Coordinator of Transportation (Joseph B. Eastman), which recommended regulatory legislation to Congress in 1934 (S. Doc. 152, 73rd Congress, 2d Sess.) discloses that a principal competitive evil then besetting the motor transport industry was the freedom of contract carriers, which it characterized as "so large and disturbing a factor in the trucking industry" (*id.* at 15), to seek "the more profitable business, leaving to the common carrier more generally the small freight and the responsibility of furnishing scheduled service the year around" (*id.* at 33).

The 1935 Report of the Coordinator (H. Doc. 89, 74th Congress, 1st Sess.), which resubmitted the proposed legislation, singled out the contract carriers' "tendency to demoralize or impair the system of common carriage which * * * is of prime importance to the country" (*id.* at 17). The Report recommended regulation of contract carrier activities "for the chief purpose of protecting the common carriers against unfair and demoralizing competition," and explained that "In the legislation which is here proposed, the effort has been made to follow this principle" (*ibid*). Again, testifying on behalf of the proposed legislation in February 1935, Coordinator Eastman stated (*Regulation of Interstate Motor Carriers,* Hearings

before the Subcommittee of the House Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., p. 28):

> * * * When we come to the field of transportation performed by motor vehicles, we encounter conditions which do not exist to any extent in the case of the railroads. In addition to the common carrier, those carriers who hold themselves out to serve all of the public along a particular route or in a particular district, you have the contract carriers, who do not hold themselves out to serve the public in that way but merely bargain and deal with individual shippers. And you also have many private carriers; that is to say, trucks owned by individuals or business concerns which transport their own goods and do not carry for others.
>
> So far as the regulation of these private and contract carriers is concerned, it seems to me that the important principle which should govern and which justifies any such regulation is the need for protecting the common carrier who undertakes to serve all the public. The common carrier is the one, it seems to me, that the Government ought, particularly, to foster and protect. * * *

As noted above, the Motor Carrier Act was based on the Coordinator's proposal.

In *Contracts of Contract Carriers,* 1 M.C.C. 628 (1937), the Commission (Division 5, including Commissioner Eastman) spelled out its contemporaneous

understanding of the underlying purpose of the Act, saying at pages 628–629:

> Contract carriage is a form of private carriage, as distinguished from the carriage for the general public which common carriers hold themselves out to perform. That the business of common carriers is a public calling and subject as such to public regulation has long been recognized. It has become evident, particularly in the motor-carrier field, that private carriage also is sufficiently affected with a public interest to warrant public regulation, at least to an extent. The term "contract carrier" was coined in State statutes for the regulation of motor carriers. In a number of these statutes, protection of the common carrier was expressly recited as the purpose of regulating the contract carrier. In others, this purpose appeared by necessary implication. The justification for such regulation, because of the public interest by which the contract carrier is affected, was well stated in *Stephenson* v. *Binford,* 53 Fed. (2d) 509. The court said:
>
> "We think that, if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriers by road, that all of its available carriage services are so bound together and so interdependent that the public may not continue to have a safe and dependable system of transportation unless private (contract) carriers operating on the same roads with common carriers are brought under just and reasonable

> regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so."
>
> This principle is inherent in the Motor Carrier Act, 1935. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. For that reason it differs from the common-carrier regulation.

Reiteration of this "underlying purpose" may be found in numerous Commission reports. *E.g., Acme Fast Freight Common Carrier Application,* 2 M.C.C. 415, 432 (1937); *Scott Bros. Collection and Delivery Service,* 4 M.C.C. 551, 559 (1938); *Keystone Transportation Co. Contract Carrier Application,* 19 M.C.C. 475, 491 (1939) and 497–498 (Commissioner Eastman concurring); *Filing of Contracts by Contract Carriers,* 20 M.C.C. 8, 11 (1939); *New England Motor Rate Bureau* v. *Lewers and McCauley,* 30 M.C.C. 651, 663 (1941); *Government Freight Contract Carriers by Motor Vehicle,* 301 I.C.C. 551, 556–557 (1957). And the same objective is evoked by judicial expressions in a similar vein. Thus, in *Motor Haulage Co.* v. *United States,* 70 F. Supp. 17 (E.D.N.Y. 1947), affirmed 331 U.S. 784, where a contract carrier attacked an order granting it a permit subject to certain limitations, the court said (p. 23):

> The Commission's action is not difficult to understand. It had classified plaintiff as a contract carrier. In line with the declared purposes of the statute [quoting in the margin the

> National Transportation Policy] it evidently wished to prevent any encroachment by the plaintiff on the field of common carriage, at least in interstate commerce, and beyond any exempt area. Since a contract carrier, unlike a common carrier, may choose its customers and, within limits, the form and character of its obligation, it should not, while enjoying those privileges, be allowed at the same time to compete in the field of common carriage. To have allowed plaintiff to do what it apparently desired would have been to sanction what the declaration of policy, quoted in the margin, called "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

See *Doyle Transfer Co.* v. *United States,* 45 F. Supp. 691, 695 (D.D.C. 1942).

Both the Senate and House Committees on Interstate and Foreign Commerce gave explicit expression to this underlying purpose in their reports recommending passage of S. 943, amending section 218(a) of the Interstate Commerce Act, 49 U.S.C. § 318(a), to require contract carriers to file with the Commission their actual rates or charges for transportation service. S. Rep. No. 335, 85th Cong., 1st Sess., p. 2 (1957); H.R. Rep. No. 895, 85th Cong., 1st Sess., p. 2 (1957). The following language appears in both reports:

> The underlying purpose of the Motor Carrier Act (pt. II of the Interstate Commerce Act) is the promotion and protection of adequate and efficient common-carrier service by motor

vehicle in the public interest. The regulation of contract carriers was designed with that end, among others, in view.

It is significant that S. 943 became law on August 13, 1957 (71 Stat. 343)—just nine days prior to the enactment of the amendments to sections 203(a)(15) and 209(b) involved here.

B. THE COMMISSION'S CONSISTENT PRACTICE OF TREATING THE AVAILABILITY OF ADEQUATE COMMON CARRIER SERVICE AS A CRUCIAL FACTOR IN PASSING UPON APPLICATIONS FOR CONTRACT CARRIER AUTHORITY IS AN APPROPRIATE IMPLEMENTATION OF THE STANDARD OF CONSISTENCY WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY AND THE REGULATORY PURPOSE OF THE MOTOR CARRIER ACT

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), provides in pertinent part that a permit shall be issued to a qualified applicant if it appears "that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle * * * and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act;[4] otherwise

[4] As initially enacted in the Motor Carrier Act of 1935, the standard in section 209(b) was "consistent with the public interest and the policy declared in section 202(a) of this chapter," 49 Stat. 552. Section 202(a) was the prototype of the National Transportation Policy, containing substantially identical language but being expressly limited to motor carriers, 49 Stat. 543. When the National Transportation Policy was enacted as part of the Transportation Act of 1940, 54 Stat. 499, former section 202(a) was stricken and section 209(b) was amended to reflect the standard in its present form, 54 Stat. 919.

such application shall be denied." The National Transportation Policy, which is "the Commission's guide to the 'public interest' " (*McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82) and "the yardstick by which the correctness of the Commission's actions will be measured" (*Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88), enjoins the Commission to administer the Act so as, *inter alia,* "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 49 U.S.C., preceding §§ 1, 301, 901 and 1001.

In its report, the Commission described its practice in passing upon contract carrier applications prior to the amendments to sections 203(a)(15) and 209(b) as follows (R. 37–38):

> As seen, prior to these amendments, even where a highly specialized service was proposed, the existence of common carrier service, if any, and whether or not that service would meet the reasonable transportation needs of those supporting the application, was always considered in our determination of applications for contract carrier authority. The ability of

common carriers to compete with contract carriers for the same traffic has been recognized from the inception of motor carrier regulation in 1935, and in each contract carrier application opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application. Early in *C. & D. Oil Co. Contract Carrier Application*, 1 M.C.C. 329, 332 an application for contract carrier authority, it was said:

"We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed."

For many years this principle has been followed in disposing of applications for contract carrier permits opposed by common carriers, the decisive factor being whether the available common carrier service was reasonably adequate to meet the transportation needs involved.[3]

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[3] *Arrow Transp. Contract Carrier Application*, 73 M.C.C. 261; *Refiners Transport, Inc., Extension—Missouri*, 71 M.C.C. 272; *Overland Freight Lines Inc., Extension—Kentucky*, 69 M.C.C. 143; *Guex Extension—Chicago Commercial Zone*, 67 M.C.C. 224; *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561; and *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311.

This administrative construction had been followed consistently during the more than twenty years which elapsed between the passage of the Motor Carrier Act of 1935 and the passage of the 1957 amendment;[5] and it has received judicial approval.

In *Wilson* v. *United States,* 114 F. Supp. 814 (W.D. Mo. 1953), the court sustained the Commission's denial of an application for a contract carrier permit because of adequate existing common carrier service, but remanded the case to the Commission for further consideration with respect to the shipper's need for transportation of certain commodities not included within the authority of the motor carrier protestants. The court said at page 819:

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[5] The cases cited in the report are but a few of the host of like Commission decisions. While there is little point in burdening the Court with an exhaustive compilation of these cases, the following, together with the cases cited by the Commission, constitute a representative sample of the reported decisions prior to the 1957 amendments: *Smith Contract Carrier Application,* 1 M.C.C. 717 (1937); *Carr Contract Carrier Application,* 2 M.C.C. 263 (1937); *Eastern Shore Oil Co. Contract Carrier Application,* 7 M.C.C. 173 (1938); *Scott Extension of Operations,* 11 M.C.C. 227 (1939); *Daum Extension of Operations—Illinois,* 22 M.C.C. 366 (1940); *Major Contract Carrier Application,* 43 M.C.C. 795 (1944); *B. & F. Bus Service Contract Carrier Application,* 53 M.C.C. 501 (1951); *Benson Co. Extension—N.Y., N.J., and Pa.,* 66 M.C.C. 160 (1955); *Beatty Motor Express Extension—Soap to Pittsburgh, Pa.,* 66 M.C.C. 160 (1955); *Monterrey Freight Forwarding Corp. Contract Carrier Application,* 68 M.C.C. 456 (1956); *C. & E. Trucking Corp. Extension—Ice Cream Mix,* 71 M.C.C. 568 (1957); *District Hauling & Contracting Co. Extension—York, Pa.,* 72 M.C.C. 207 (1957); *Rapp Extension—Stoves,* 72 M.C.C. 446 (1957).

In its order, the Commission defined the issue which it considered should be resolved "[i]n determining whether the proposed contract-carrier operation will be consistent with the public interest, * * *." It stated the issue as follows: "We must ascertain whether the reasonable requirements of the supporting shipper may adequately be met by available carriers." In the setting of this contract-carrier proceeding, we believe the Commission properly conceived and defined the issue to be resolved, before petitioners were entitled to a certificate of convenience and necessity [sic., "permit" intended] on their application. In the past, the Commission has stated in a number of cases before it that "in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territory served by them as against any person now seeking to enter the field of motor carrier transportation in circumstances such as are here disclosed." *Louis Jagel & Louis A. Jagel, Extension,* 5 F.C.C. 94; *Forrest Worm & Fred Worm—Extension of Operations,* 32 M.C.C. 641. In the expertise of the Commission, we believe it to be authorized and empowered under the I.C.C. Act to so define the issue to be resolved on an application such as here involved. We accept such as being the legal issue before the Commission, and in this review proceeding shall confine our consideration as to whether that issue as resolved by the Commission is supported by substantial evidence.

In *Bass* v. *United States,* 163 F. Supp. 1 (W.D. Va. 1958), affirmed 358 U.S. 333, rehearing denied 359 U.S. 956, the court upheld the Commission's denial, prior to the 1957 amendments, of a permit to operate as a contract carrier by motor vehicle in interstate charter service saying (p. 3):

> We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service [sic., the existing common carrier charter service intended] is adequate and whether the additional proposed service will be inconsistent with the public interest and the national transportation policy.

Cf., *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 90.

This same principle has been approved by the courts in cases involving motor carrier acquisitions of control under section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), with its like standard of "consistent with the public interest." In such cases, the courts have repeatedly upheld Commission decisions withholding approval of proposed unifications of motor carriers which would create a new service competitive with existing carriers, on the ground that the evidence failed to show that the resulting service would supply any need which could not be adequately met by existing carriers. *Ratner* v. *United States,* 162 F. Supp. 518, 519 (S.D. Ill. 1957), affirmed 356 U.S. 368; *Herrin Transportation Co.* v. *United States,* 108 F. Supp. 89, 94–95 (E.D.

La. 1952), affirmed 344 U.S. 925, rehearing denied 345 U.S. 914; *Houff Transfer, Inc.* v. *United States,* 105 F. Supp. 851, 855 (W.D. Va. 1952); *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J. 1951), affirmed 343 U.S. 944.

As this Court pointed out in *American Trucking Associations* v. *United States,* 344 U.S. 298, 312–313, the Congressional purpose in requiring authorization for all interstate for-hire motor carrier operations was to preserve the motor carrier transportation system from the over-competition which had contributed to its instability. That the promotion and protection of adequate and efficient common carrier service was specifically purposed has been shown above at pages 15–21. The long-settled and judicially approved practice of the Commission in this area obviously was designed to curb the destructive effects of over-competition, and, thereby, to foster sound economic conditions in transportation, by preventing the promiscuous entry of carriers to perform services which were not needed because existing carriers were able and willing to perform them adequately. We submit that this was, and is, fully responsive to the Congressional purpose and a clearly appropriate implementation of the pertinent provisions of the National Transportation Policy.

C. THE 1957 AMENDMENTS DID NOT IMPAIR THE COMMISSION'S POWER AND DUTY TO CONSIDER A SHOWING BY A PROTESTING COMMON CARRIER THAT IT IS ABLE AND WILLING TO PROVIDE ADEQUATE TRANSPORTATION SERVICE

1. *The specific language of section 209(b), as amended, requires that the Commission consider such a showing*

Effective August 22, 1957, section 209(b) was amended, along with the definition of contract carrier by motor vehicle in section 203(a)(15). So far as is pertinent here, the standard in section 209(b) governing applications for contract carrier permits was retained intact, but Congress added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers and [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements.*

The court below appears to hold that the 1957 amendments preclude the Commission from considering the availability and adequacy of existing common carrier service. Thus, the court stated, in effect, that such consideration involves the importation of "a sixth criterion specifically rejected by Congress" (R. 173) and that "there is no longer a need to resort to

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*The numbers in brackets are not in the text but have been supplied for convenience of reference and because the district court and the Commission refer by number to the five criteria added by the 1957 amendments.

special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments" (R. 176). We submit that in so holding the district court erred.

First, it is readily apparent from the plain language of the statute that the availability of common carrier service and its adequacy to fulfill the requirements of the supporting shipper are relevant to, indeed implicit in, the third and fourth criteria which the Commission is required to consider. Obviously, if the Commission is to properly discharge its obligation to consider "the effect which granting the permit would have upon the services of the protesting carriers," it must receive and consider proof offered by protesting carriers that they are able and willing to fulfill the transportation requirements of the shipper. As the Commission noted in its report (R. 42), "The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them."

Similarly, in addressing itself to the fourth criterion, the Commission properly said (R. 46), "Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements." The question of whether there is need of the shipping public for the proposed service inherently embraces the complementary question of whether existing, available service is adequate. They are but opposite sides of the same coin.

Secondly, the retention in the 1957 amendments of the identical governing standard of "consistent with the public interest and the national transportation policy" is a clear indication that the availability of adequate common carrier service continues to be a significant factor to which the Commission must give due consideration. Surely, if it were pertinent to a proper application of the standard prior to 1957, as it clearly was, it continues to be so.

Nor is it of any moment that the availability of adequate service is not in terms referred to in the statute, for it was not mentioned prior to 1957. It is enough that it is a factor implicit in, and relevant to, the statutory standard and specific criteria. For example, this Court has repeatedly approved the Commission's practice of imposing so-called "auxiliary and supplemental" restrictions in connection with common carrier certificates and contract carrier permits issued to motor carrier subsidiaries of railroads. The Court has done so despite the fact that this practice results from the importation into sections 207 and 209 of a standard articulated only in section 5(2)(b), 49 U.S.C. § 5(2)(b), pertaining to railroad acquisitions of motor carriers. See *American Trucking Associations* v. *United States*, 364 U.S. 1; *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60.

In the *American Trucking Associations* case, *supra*, the Court held that the Commission had exceeded its statutory authority by granting to a motor carrier

subsidiary of a railroad permits to act as a contract carrier under section 209(b), as amended in 1957, since the Commission failed to impose "auxiliary and supplemental" restrictions and failed to make findings sufficient to establish the existence of "special circumstances" justifying waiver of such restrictions. In the course of its opinion, the Court clearly recognized that the need of the supporting shipper for the proposed service and its complement, the ability and willingness of existing carriers to render adequate service, are factors which the Commission may properly consider under the amended section 209(b). Responding to the contention that the Commission had found the existence of "special circumstances" justifying its failure to impose the restrictions, the Court said (pp. 13–14):

> * * * Appellees point to various findings of fact by the Commission, such as the need of General Motors for a service of the type here involved, Pacific Motor's experience and qualifications, and the unlikelihood that a significant amount of traffic would be diverted from rail to motor transportation even if the permits were granted. The difficulty with appellees' argument is that the Commission did not find that considerations of this nature constituted "special circumstances" under the *American Trucking Associations* rule, but rather viewed them simply as supporting the basic determinations which it was required to make under § 209(b) in order to issue a contract carrier permit to *any* applicant.[1] * * *

[1] Here the Court reproduced, in a footnote, section 209(b) with the 1957 amendment in italics.

> * * * There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor. * * *

Recently, in *Alexander, Barcroft and Washington Transit Co.* v. *United States,* Civil No. 2023, E.D. Va., opinion dated July 10, 1961, judgment entered August 14, 1961, 14 Fed. Carr. Cas., par. 81, 395, a three-judge district court[8] explicitly emphasized the importance of the availability of adequate common carrier service in setting aside a Commission order granting a permit to a contract carrier after the passage of the 1957 amendments. In that case, holding that there was a need for the service involved (charter service to the Government for the transportation of its personnel) and that it was contract carrier service which the common carrier participants were not authorized to provide, the Commission granted contract carrier permits to perform the service.[9] The court, in an opinion by Judge Bryan, after holding that the plaintiff common carriers can provide the charter service upon their existing lines and are not precluded from doing so by any provisions of the Act, stated:

> Another and overriding reason for our disagreement with the Commission is that its decision allows a contract carrier to carve a service out of the province of a common carrier. This would violate an established policy of

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[8] Chief Circuit Judge Sobeloff, Circuit Judge Haynesworth, and District Judge Bryan.

[9] *Alexandria, B. & W. Transit Co. Common Carrier Application,* 78 M.C.C. 655 (1959).

> transportation control. Where a service can be supplied either by common or contract carrier, no permit therefor should be granted the contract carrier. Vide: the definition of contract carrier in Section 203(a)(15) as omitting all potential common carriage; Sec. 209(b), as amended, directing consideration of the effect upon protesting carriers of the granting of a contract carrier permit; and also *Bass* v. *United States,* 163 F. Supp. 1, 3 (W.D. Va. 1958) aff. 358 U.S. 333.

Later in its opinion, the court added:

> The upshot of the statutory definitions and the transportation policies, noted earlier, is that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy here, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it.

2. *The history of the 1957 amendments shows that Congress did not intend or contemplate a prohibition against Commission consideration of such a showing*

The 1957 amendments were initiated by the Commission as an aftermath of the decision of the Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956), which appeared to open the door to the proliferation of contract carrier services in competition with common carriers, thus tending to obliterate the distinction between common and contract carriers. S. Rep. No. 703, 85th Cong., 1st Sess. (1957), p. 6; 70 I.C.C. Ann. Rep. 162–164 (1956). In order to enable the Commission to limit the number of persons

whom a contract carrier may service without securing additional authority, the Commission proposed legislation embodied in S. 1384 and H.R. 5123, 85th Cong., 1st Sess. (1957). See S. Rep. No. 703, *supra*, at 1. These bills provided, insofar as is pertinent here, that sections 203(a)(15) and 209(b) are amended: [10]

> (1) By changing paragraph (15) of section 203(a) thereof (49 U.S.C. sec. 303(a)(15)), to read as follows:
>
> "(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.";
>
> * * * * *
>
> SEC. 2. Part II of such Act is further amended by inserting between the words "thereunder," and "that" in the second sentence of section 209(b) (49 U.S.C. 309(b)), the following: "that existing common carriers are

[10] S. 1384 is reprinted in the hearings on the bill, *Surface Transportation—Scope of Authority—I.C.C.*, Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee on S. 1384, etc., 85th Cong., 1st Sess. (1957), p. 6, hereafter referred to as "Hearings on S. 1384."

unwilling or unable to provide the type of service for which a need has been shown," * * *.[11]

Certain language i the proposed legislation encountered vigorous op sition, notably from the Contract Carrier Conference, an appellee in this case. Specifically, that opposition was directed to the clause "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and the phrase in the definition of the term contract carrier by motor vehicle which states "and not provided by common carriers." The nature of the opposition is reflected in the testimony of the General Counsel of the Contract Carrier Con-

[11] The proposed section 209(b) would have read:

"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, *that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown*, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. * * *" [Emphasis supplied.]

ference, Mr. Todd. In his prepared statement, Mr. Todd said (Hearings on S. 1384, *supra*, at 303):

> S. 1384 would amend section 209(b) in such a way as to make it necessary for any contract carrier seeking new or extended authority to prove that the service proposed was one that common carriers were unwilling or unable to perform. Such requirement would, for all practical purposes, put to an end any extension of contract carrier services, for in practically every instance where a contract carrier seeks either new or extended rights, opposing common carriers oppose the application alleging that they are willing and able to perform the proposed service. Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing carriers, to prove that such carriers were unable to perform a given service.

The language in the definition was opposed for the reason that, since many common carriers provide the same type of service as do contract carriers, numerous existing contract carriers could not meet the test of performing a service "not provided by common carriers," so would lose their status as contract carriers and would have to seek certification as common carriers or go out of business. See *id.* at 295, 301–302; S. Rep. No. 703, *supra*, at 4.

The Commission deferred to the stated position of the Contract Carrier Conference and agreed to the elimination of the objectionable language for the reasons stated by its chairman. Thus, Chairman Clarke said (Hearing on S. 1384, *supra*, at 23–24):

> * * * As drafted, S. 1384 would further provide that additional permits may be issued only pending a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point that because of the very difficult burden of proof that would be imposed upon applicants by the last-mentioned provision, the Commission, upon further consideration, has voted to withdraw its recommendation to amend section 209(b) in this respect. * * *

And, in a letter to the Chairman of the Senate Subcommittee, he stated (*id.* at 43–44):

> You will recall that the Commission recommended during the hearing that S. 1384 be amended by removing the requirement of a showing that existing common carriers are unwilling or unable to render the required type of service. Upon further consideration the Commission has unanimously voted also to recommend that the words "and not provided by common carriers" be deleted from line 6 on page 2 of the bill. These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position and with the standard already provided in the bill respecting special and individualized service.

The Senate Committee recommended passage of the bill with amendments in their present form. S. Rep. No. 703, *supra*, at 1, 7–8. This amended version, as embodied in H.R. 8825, 85th Cong., 1st Sess. (1957), was the subject of a report of the House Committee on Interstate and Foreign Commerce recommending its passage. H.R. Rep. No. 970, 85th Cong., 1st Sess. The House report reflects that the bill had the support of the transportation industry (*id.* at 2) and of the Commission (*id.*, appendix). On August 22, 1957, it became law. 71 Stat. 411–412.

It is perfectly clear from the testimony of its spokesman that the Common Carrier Conference sought no change in the basic standard governing applications for contract carrier permits, and that there was no notion that the elimination of the objectionable language or the addition of the specific criteria in section 209(b) removed the availability of adequate common carrier service as an appropriate factor for consideration by the Commission. At pages 299–300 of the Hearings on S. 1384, the General Counsel of the Conference said:

> * * * Now, in addition, Mr. Chairman, to the suggestion that we thought would be helpful to the Commission we had a suggestion that we thought would be helpful to the contract carriers. As I have stated before, the contract carrier must obtain a permit from the Interstate Commerce Commission. The suggestion that we have made, both before this committee and before the Commission, would limit contract carriers rather than provide for any expansion, so that we felt that section 209(b),

the section of the law under which the Commission may grant a new contract-carrier permit, or the extension of a permit, if it is shown that the service proposed is consistent with the public interest and the national transportation policy.

We do not suggest any change in that standard. The only thing we have suggested in that connection is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out, and I have put into my statement the exact language which we have suggested, that the primary thing that we have always felt the Commission should do in those cases is *consider not only the effect of granting this authority on the common carrier—they do that in each and every case*—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration. * * * [Emphasis supplied.]

Certainly, there is no reason to believe that the purpose or effect of the 1957 amendments was to enhance the position of the contract carriers at the expense of common carriers by opening the door to new contract carrier service where adequate common carrier service exists. We cannot conceive that a bill having such a purport would have received the support of the railroads, the motor common carriers, and the Commission (See H.R. Rep. No. 970, *supra*, at 2)—or the support of a Senate Committee which said (S. Rep. No. 703, *supra*, at 7):

> Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy require that the bill, as amended, be passed.

Our position finds strong support in another legislative development which was current when the instant amendments were considered and enacted, namely, the 1957 amendments to Part IV of the Interstate Commerce Act dealing with freight forwarders, 49 U.S.C. § 1001–1022. Part IV requires for issuance of a permit proof that the proposed service "is or will be consistent with the public interest and the national transportation policy" 49 U.S.C. § 1010(c). As originally passed in 1942, the Act forbade denial of a permit "solely on the ground that such service will be in competition with the service subject to this part performed by any other freight forwarder or freight forwarders." 56 Stat. 291. On August 28, 1957 (six days after passage of the amendments involved in the present litigation), Congress amended 49 U.S.C. § 1010(d) to lift the stated prohibition in all instances except that in which the applicant is a corporation controlled by, or under common control with, a railroad. 71 Stat. 432.

In its report recommending enactment of the amendment, the Senate Committee on Interstate and Foreign Commerce said (S. Rep. No. 542, 85th Cong., 1st Sess. (1957), pp. 2–3):

> In the administration of other parts of the act the consideration most frequently weighed by the Commission, in determining whether a

new carrier service will be consistent with the public interest, is its probable effect upon existing carriers. The Commission repeatedly has stated that the maintenance of sound economic conditions in transportation would be jeopardized by allowing new operators to enter a field in competition with existing carriers who are furnishing adequate, efficient, and economical service. (See *Lifschultz, Extension,* 265 I.C.C. 431, 439 (1948)). Being prohibited from taking this vital factor of competition into consideration in passing upon applications for freight-forwarder permits, the Commission has felt compelled to grant permits with great liberality. This has resulted in overcrowding the forwarder field and ultimately the ill effects will be felt by the general public which depends upon freight-forwarder services.

* * * * *

It has long been recognized that in order to maintain sound economic conditions in transportation, and to insure adequate, efficient, and economical service for the public, the Interstate Commerce Commission must have effective control over the number of entrants and extent of service in any given field of transport. As early as the Transportation Act of 1920, it was provided, in section 1(18) of the act, that no carrier by railroad shall undertake any extension of its line or construct a new line of railroad unless there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require it. The same pattern of controls was extended to common carriers by motor and water when they were brought under regulation.

Under the above-mentioned provisions of the act, the Commission has regularly and frequently denied application for new or additional operating authority upon the grounds that the service of existing carriers was adequate to meet all reasonable requirements of the shipping public, and that the institution of additional service would result in needless and uneconomic duplication of existing facilities.

However, because of the provisions of section 410(d), the Commission has felt compelled to grant freight-forwarder permits without regard to these considerations. The Commission's interpretation of the statute was spelled out in *Lifschultz Fast Freight, Extension—West and Midwest* (265 I.C.C. 431 (1948)). The Commission placed great weight on section 410(d), being of the view that the purpose of that section—

"is to assure that freight-forwarder applications shall not be denied as were motor contract carrier applications, on the ground that the existing service is adequate (265 I.C.C. 431, 440)."

See also the report of the House Committee, H.R. Rep. No. 880, pp. 3–4.

Here is positive evidence that the same House and Senate Committees which recommended passage of the amendments to sections 203(a)(15) and 209(b) were aware of the Commission's practice of giving due consideration to the existence of authorized carriers and the adequacy of their service, and of its importance in motor carrier regulation. It is hardly likely that these Committees intended to withdraw

this protection from existing common carriers while conferring it upon the freight forwarders.

In speaking of amendments to another act, it was said (*Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 139 (dissenting opinion of Mr. Justice Frankfurter): "An amendment is not a repeal. An amendment is part of the legislation it amends. The 1947 amendments to the Federal Tort Claims Act of 1946 must be read to harmonize with the central purpose of the original act." Similarly, the present amendments must be read to harmonize with the underlying purpose of the Motor Carrier Act, the promotion and protection of adequate common carrier service; and, we submit, this objective requires that the availability and adequacy of that service be accorded appropriate weight.[12]

The amendment to section 209(b) as originally proposed would have imposed upon an applicant for a contract carrier permit the burden of proving (1) that it is fit, willing, and able, (2) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," and (3) that the proposed operation will be consistent with the public interest and the national transportation policy. The effect of the second requirement may well have been to require the applicant to negative

[12] Where a statute is concerned "with problems at once complicated and far-reaching in their repercussions," courts will examine carefully an interpretation of an amendment which would "mark the first departure from what appears to be a heretofore consistent Congressional policy." See *Guessefeldt* v. *McGrath*, 342 U.S. 308, 315, 319.

the existence of available, adequate common carrier service as a part of his affirmative or *prima facie* case. At the very least, it imposed upon him the burden of proving that existing common carriers are unable or unwilling to provide adequate service, rather than requiring common carriers opposing the application to prove that they stand ready to provide adequate service. As we have shown, *supra,* at 36–37, this requirement was objected to, and withdrawn because, and only because, of "the very difficult burden of proof" it would have imposed on the applicant.

Nowhere in the entire legislative history of the 1957 amendments is there criticism, questioning, or disapproval of the Commission's practice of attaching important weight to the existence of adequate service. In our view, the only significance which can be drawn from the deletion of the proposed language is that it left the situation respecting the availability of adequate service as it had always been. Certainly, it does not mean that the Commission must decline to receive evidence from protesting common carriers that they are authorized, able and willing to provide service adequate to meet the supporting shipper's needs. Of course, the applicant and his supporting shipper are free to rebut such evidence wherever possible. (An obvious way is by showing that the protestants have been tried and found wanting.) But where the protestants affirmatively prove the adequacy of their service, we submit that the Commission's obligation to accord that showing due weight remains unchanged.

More broadly, the decision below would make entry into contract carriage easier than entry into common carriage, in that adequacy of existing service would be an appropriate factor for the Commission to consider in acting upon applications for common carrier certificates of public convenience and necessity, but not in determining applications for contract carrier permits. Nothing in the legislative history of the 1957 amendments even faintly suggests that the Congress intended such a result. Surely, such a purpose cannot be inferred in a statutory amendment which originated in a purpose to restrict contract carriage, and in the teeth of a continuing and dominating Congressional objective to foster the common carrier system.

II. THE COMMISSION GAVE APPROPRIATE CONSIDERATION TO THE EXISTENCE OF AN AUTHORIZED COMMON CARRIER ABLE AND WILLING TO PROVIDE ADEQUATE SERVICE IN PASSING UPON THE INSTANT APPLICATION

A. THE COMMISSION PROPERLY CONCLUDED THAT THE PROTESTING COMMON CARRIER IS FULLY ABLE AND WILLING TO MEET THE SUPPORTING SHIPPER'S NEEDS AND THAT, IN VIEW OF THE ADEQUACY OF EXISTING COMMON CARRIER SERVICE, THE SHIPPER WOULD NOT BE MATERIALLY AFFECTED BY A DENIAL OF THE PERMIT

Speaking of the Commission's conclusion with respect to the effect which denying the permit would have upon the supporting shipper, the district court said (R. 177):

> * * * And in this connection it should be noted that in reaching the conclusion that the shipper will suffer no adverse effect because U.S.A.C. is willing and able to perform, the Commission has entirely ignored the affirma-

> tive evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier. The Commission has neatly solved the problem with its finding that common carrier service is "adequate". Inasmuch as the "willing and able" test at times seems indistinguishable from, and in the eyes of the Commission, synonymous with, the "adequacy test", a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's *"reasonable transportation needs"*, that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

In so stating, we submit, the court misconceived the nature of the Commission's findings and usurped the administrative function of evaluating the evidence.[13]

In its report, the Commission said (R. 46–47):

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[13] *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 488; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *United States* v. *Pan-American Petroleum Corp.*, 304 U.S. 156, 158; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547–548.

If the court's language is intended to express the view that common carriers may not lawfully provide specialized services to meet a shipper's distinct needs (see the court's statement at R. 175), we submit that this ignores a lengthy history of

Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon the very kind of traffic as is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offers such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of

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specialization within the common carrier industry, as exemplified by such specialists as haulers of automobiles, heavy haulers, explosives transporters, tank truck operators, and the like. We respectfully refer the Court to the accurate summary of this development in the Commission's report (R. 36–37).

the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the exclusive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service.

Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary the very business of U.S.A.C. is the transportation of the type of traffic involved.

As a consequence, the Commission concluded that "U.S.A.C. is fully able to meet the shippers' needs" and that "in view of the adequacy of existing common carrier service the supporting shippers would not

be materially affected by a denial of the applications" (R. 49).

In an apparent reference to the paragraph last-quoted above, the district court said that the Commission goes beyond the language and scope of the statute when it assumes and requires (1) that the applicant carries the burden of showing that existing services are inadequate and (2) that the expressed willingness and ability of opposing carriers, together with absence of proof that such service has been tried and found wanting *ipso facto* vitiates a contention that the service is needed by the shipper (R. 170). We assert that the court has inaccurately characterized what the Commission did. It affirmatively appeared from evidence adduced by the protesting carrier, U.S.A.C., that it was authorized to serve the points involved, was performing a highly specialized service in transporting aircraft parts, and was able and willing to do all that was necessary to meet the shipper's requirements. We think it clear that the Commission's determination was based on the totality of this showing and not upon an improper imposition of a burden of proof on the applicant; and that, when read in context, the statement "we cannot find that existing service has been shown to be inadequate" merely means that neither applicant nor his supporting shipper has succeeded in rebutting this proof.

The essential facts respecting the service required by the supporting shipper and the service which the protesting common carriers are able and willing to

provide are summarized in the Commission's report as follows (R. 32–33: [14]

> Boeing Airplane Company, hereinafter called Boeing, supports the Sub-No. 102 application. A manufacturer at Indianapolis supplies Boeing with landing-gear bulkheads which it installs in planes at its Wichita assembly plant (R. 84). The dimensions of the forward and aft bulkheads are 128 by 90 by 42 inches and 122 by 181 by 24 inches, and they weigh 1,380 and 1,340 pounds, respectively (R. 85). The service needed as regards the movement of landing-gear bulkheads are similar to those of North American in that these articles, because of their nature, must be transported in specially designed, closed equipment, with their delivery being made in accordance with Boeing's production schedule (R. 69–70, 85–86). While applicant must deadhead its equipment 700 miles from Wichita to Indianapolis to perform the proposed service, (R. 79, 103) it has sufficient advance notice to schedule the movement (R. 102). Prior to the use of its service under appropriate temporary authority, the shipper used rail service, but the necessity of constructing special containers made the cost of this service prohibitive (R. 87–88). During a 4-month period applicant transported about four shipments a month in one of its trailers equipped with special fixtures for transporting this particular shipper's traffic and assigned to the exclusive use of shipper (R. 69, 73, 76, 80). This service has been highly satisfactory. Al-

[14] We have interpolated record references to the supporting evidence at the appropriate places.

though the shipper knew that U.S.A.C. was authorized to perform the proposed service, (R. 101, 103, 104) it did not request that carrier to supply equipment for the reasons that U.S.A.C.'s tariff provides that it can exercise control over the type of equipment that will be used for any particular shipper, and, in 1953, it had unsatisfactory experiences in the use U.S.A.C.'s service (R. 101, 105).

U.S.A.C. holds certificates authorizing it, insofar as here pertinent, to transport, over irregular routes, aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) between Indianapolis and Wichita (Ex. 16, R. 148, 150; R. 111–112). Approximately 60 percent of its traffic consists of aircraft parts other than engines and the remainder consists principally of aircraft engines.[15] As a result of having served the aircraft industry almost exclusively over a period of years, it is accustomed to modifying its equipment to meet the specific requirements of particular aircraft manufacturers, and it is able to tailor its service to fit the production schedules established by its customers (R. 112–113, 115–116, 118; Ex. 16, R. 149). It maintains, among others, terminals at Dallas, Tex.

[15] Support for this statement appears at pages 102 and 121 of the transcript in the Commission's Docket No. MC–11185 (Sub-No. 100), the companion docket respecting J-T Transport's application for authority to serve North American Aviation, Inc., which is also embraced in the Commission's report. Since no review was sought of the Commission's denial of this authority, the record in Sub-No. 100 was not introduced in the district court and is not before this Court.

approximately 15 miles from Garland and Grand Prairie, and at Topeka, Kans., and Indianapolis (R. 112). It operates 173 tractors and 225 trailers (Ex. 15, R. 147), some of which, if fitted to the shippers' specifications, would be suitable for transporting the considered traffic (R. 112–113). Its drivers are required to have security clearance (R. 118). If tendered the considered traffic, it would modify and make available to the shippers whatever equipment is necessary to meet their transportation requirements (R. 112–113, 118).

Two so-called heavy haulers, both common carriers, submitted evidence in opposition to the Sub-No. 102 application. Belger Cartage Service, Inc., holds authority to operate between points in Missouri and Kansas (R. 125) and Daniel Hamm Drayage Company is authorized to operate between points in Indiana and Missouri (R. 131). By interlining at Kansas City, they purport to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction (R. 126–129, 132–134, 137). There is also interline rail service from Indianapolis to Wichita (R. 138).

We think it clear from the Commission's report and the record that the Commission's findings are entirely adequate, responsive to the statutory test, and amply supported by the evidence. Certainly, it cannot be successfully maintained that the Commission's conclusion here lacks sufficient explication or is not supported by substantial evidence.

B. THE COMMISSION PROPERLY CONCLUDED THAT GRANTING THE PERMIT WOULD BE INIMICAL TO THE PRESERVATION OF SOUND ECONOMIC CONDITIONS IN TRANSPORTATION AND WOULD ADVERSELY AFFECT THE SERVICES OF THE PROTESTING COMMON CARRIER BY WITHDRAWING POTENTIAL TRAFFIC WHICH IT CAN HANDLE ADEQUATELY AND SHOULD BE GIVEN THE OPPORTUNITY TO HANDLE BEFORE AN ADDITIONAL SERVICE IS AUTHORIZED

In flatly rejecting the Commission's conclusion and rationale respecting the third criterion in section 209(b), "the effect which granting the permits would have upon the services of the protesting carriers," the district court said (R. 174):

> Consideration of the effect on the services of protesting carriers does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting a permit would have on the existing services of that carrier. The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing common carrier service is adequate, the effect on existing protesting common carrier services is adverse. Thus, since the Commission aids itself by a presumption, under this interpretation the "very difficult burden of proof" remains with the applicant and proposed shipper to negate the adverse effect on existing common carriers. The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.
>
> The consideration of the effect on the services of protesting carriers is designed to afford a measure of protection for those carriers.

> This criterion does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting of a permit would have on the services of the carrier. If the protesting carrier was actually serving a shipper and participating in the traffic involved, the granting of a permit would divert traffic from the protesting carrier, and if this diversion would cause the services of the protesting carrier to be adversely affected to a material degree, this element certainly should be considered by the Commission. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no adverse effect on the services of the protesting carrier.

And it further emphasized the extent of its disagreement with the Commission by saying (R. 176–177):

> Since the order denying the application must be vacated, we observe further that apart from the fact that a finding of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application, there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question. Since U.S.A.C. is not participating in the traffic and never has been, the permit cannot possibly divert such traffic. There is no evidence in the record that if the permit is denied, U.S.A.C. or any other existing carrier will ever be permitted to serve the needs of Boeing. * * *

Initially, we point out with respect to the court's last statement above that neither is there a scintilla of evidence that Boeing had any intention to institute private carriage to meet its transportation needs should the contract carrier permit be denied. Moreover, since U.S.A.C. is in a position to adequately handle the traffic and is apparently the available carrier best equipped to do so, it is likely that it will get the traffic. Apart from this and even if we were to assume a stated intention to institute private carriage, such an assertion should not be a material consideration. If it were, control over the issuance of motor carrier authority would effectively be taken from the Commission and delivered into the hands of the applicant and his supporting shipper by the simple expedient of having the shipper declare that a grant would have no impact on the services of existing carriers since they will not be utilized in any event. The soundness of this observation was at least implicitly recognized by this Court in *American Trucking Associations* v. *United States,* 364 U.S. 1, 18, when it said:

> • • • And surely the statement by General Motors that it would not in any event give the business to any appellant cannot derive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. • • •

The point is that, while a shipper is always perfectly free to transport its own goods, to the extent that public transportation will be utilized the able and willing existing carriers will get the traffic.

We have no quarrel with the accuracy of the district court's observation (R. 176) that "a finding of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application." But, if intended as an appraisal of what the Commission has done, it is deficient, for the Commission has not denied the application solely on the basis of such finding. It has made the required findings as to each of the specific criteria and the statutory standard. Importantly, it has carefully weighed the requirements of the shipper against the available service, and has found that there is no need for the applicant's proposed service since the existing service is adequate. We would, of course, agree that were the protesting carriers unable or unwilling to provide service adequate to meet the shipper's needs, a proposed service which would do so should be authorized without regard to the effect on the existing carriers.

While the Commission did indeed say at one place in its report that "[t]here is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of potential traffic" (R. 42), we think a reading of the Commission's full discussion reveals that it did not reach its conclusion respecting the effect on existing carriers presumptively, as the opinion of the district court suggests (R. 174). The report shows instead that the Commission's conclusion is the product of its present expert judgment as to

the requirements of the public interest as that term is illuminated by the provisions of the National Transportation Policy—a judgment which "carries a presumption of validity," *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602.

Thus, the Commission said (R. 42–43):

> Section 209(b) as it now reads sets out certain criteria which we must consider in determining whether a grant of authority will be consistent with the public interest and the national transportation policy. Most of these points may be best discussed in relation to the peculiar facts of the instant applications, but it should be noted here that one of the factors to be considered is the effect which a grant of authority would have upon the services of protesting carriers. The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them. The question presented, then, is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There

> is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before. Any doubt that we might have that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized is disspelled by the specific wording of section 209(b), and a number of applications for contract carrier authority have, in fact, been denied since the passage of the 1957 amendment in spite of the fact that the only opposition was that of common carriers. [Citing in a footnote certain of its post-amendment decisions.]

That in speaking of "the specific wording of section 209(b)," the Commission meant the standard of "consistent with the public interest and the national transportation policy," as well as the third criterion, seems clear from its further discussion. After quoting a portion of the National Transportation Policy, the Commission went on to say (R. 43–44):

> In *Schaffer Transportation Company* v. *United States*, 355 U.S. 83, 88, the Supreme Court said: "[T]his Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." The Congressional mandate could not be carried out if we were to close our eyes to any matter which might affect the good of the national transportation system as a whole. Surely sound economic conditions in the transportation industry could not be maintained if common carriers, who have the obligation of providing service to the public at large within the scope

of their authorities, were faced with a situation in which available traffic could be, as it were, withdrawn from general circulation and given to contract carriers, without these common carriers being given the opportunity to make an effective showing of their willingness and ability to provide needed service.

Again, the Commission said (R. 45–46):

> The requirement of section 209(b) that we consider the effect which a grant of authority would have upon the services of protesting carriers has, we believe, been adequately discussed. It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories they serve before a competitive service is authorized is sound doctrine, in the public interest, and in the furtherance of the national transportation policy, whether the application is one for common or contract carrier authority.

Finally, it concluded that "U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application" and that "the potential loss of traffic to U.S.A.C. outweighs any detriment to applicant" (R. 49–50).

In our opinion, the issue here is whether the Commission abused its discretion and unlawfully administered the statute in concluding that, where existing common carrier service is adequate to meet the shipper's transportation needs, granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting common carrier by withdrawing potential traffic which the protestant can handle adequately and should be given the opportunity to handle before an additional service is authorized. In Chapter I of this brief, we have shown that the Congressional purpose in requiring authorization for all interstate for-hire motor carrier operations was to promote stability in the motor carrier transportation system by preserving it from over-competition, that the promotion and protection of adequate and efficient common carriage is a specific objective, and that these objectives are reflected in the National Transportation Policy's injunction that the Act be administered to foster sound economic conditions in transportation to the end of developing and preserving an adequate national transportation system. In the final analysis, the question is, we think, whether the Commission's report as excerpted above reflects a permissible judgment to these ends. In this connection, we note that this Court has repeatedly expressed the view that "the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service." *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88; *United*

States v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535–536; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. While these cases are concerned with applications for common carrier authority, the principle should be equally applicable where contract carrier permits are sought.

We urge that the Commission should be permitted to take a broader view of the requirements of the public interest than the district court's opinion would allow. Specifically, the phrase "services of protesting carriers" must be read broadly to encompass generally the continuing ability of the existing carriers to serve potential, as well as existing, customers. It cannot be ignored that ours is a growing economy and the regulated carriers must be able to provide service adequate to meet the needs of tomorrow as well as today. As the Court said in another context, "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade* v. *United States,* 314 U.S. 534, 546. If the Commission's conclusion, that withdrawal of potential traffic constitutes an adverse effect and would not be consonant with the maintenance of sound economic conditions in transportation, be criticized as predictive, we submit that it is the prediction of an expert body with long experience in these matters. And prediction is frequently a necessary element of administrative judgment. Cf., *United States* v. *Detroit & Cleveland Navigation Co., supra,* at 241.

Apart from the generalized observations above, it should be noted that the protesting common carrier here experiences an imbalance of operations, causing vehicles to be "deadheaded" empty from the origin terminal at Indianapolis (R. 116)—a situation which would be alleviated were it given the opportunity to handle the traffic. Moreover, if the Commission is confined to consideration of the diversion of traffic which the protesting carrier is presently transporting, all newly-developed aircraft parts could be siphoned off by newly-authorized carriers on the ground that there would be no diversion from the existing carriers. The present case involves landing gear bulkheads for the B–52 bomber (R. 84). But the high rate of obsolescence in the aircraft industry constantly results in the production of new planes, parts, and accessories—hence, the creation of new traffic.

We submit that in holding that the permissible scope of the Commission's inquiry is confined to whether a grant of authority would divert substantial traffic presently being transported by the protesting carrier, the district court took an unrealistic view and one unduly restrictive of the Commission's power and duty under the statute. We think it clear that section 209(b), in requiring the Commission to consider both the effect of the grant of a permit upon the services of protesting carriers and the effect of a denial upon the applicant, cannot be read as requiring consideration of the potential loss of traffic to the appli-

cant [16] and prohibiting consideration of the potential loss to existing carriers.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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SEPTEMBER 1961.

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[16] Although the applicant has been transporting the traffic under temporary authority pursuant to section 210a(a), 49 U.S.C. § 310a(a), it is still potential traffic, as that section provides that such authority "shall create no presumption that corresponding permanent authority will be granted thereafter." The Commission's consideration of the effect of a denial on the applicant (R. 46) was not criticized by the district court and is, we submit, clearly proper.

APPENDIX

Statutes Involved

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services; without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–12, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 209

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly

to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its

business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

U.S.A.C. TRANSPORT, INC.,
COMMON CARRIER CONFERENCE—IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
And
REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J. T TRANSPORT COMPANY, INC., ET AL.,
Appellees

On Appeal From The United States District Court For The Western District of Missouri—Western Division

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BRIEF

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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 18

U.S.A.C. TRANSPORT, INC.,
COMMON CARRIER CONFERENCE—IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

And

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J - T TRANSPORT COMPANY, INC., ET AL.,
Appellees

On Appeal From The United States District Court For The Western District of Missouri—Western Division

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BRIEF

I

OPINIONS BELOW

The opinion of the District Court (R. 160) is reported in *J - T. Transport Co.* v. *United States,* 185 F. Supp. 838 (1960). The decision of Division 1 of the Interstate

Commerce Commission and that of the entire Commission appear at 74 M.C.C. 324 (1958) and 79 M.C.C. 695 (1959), respectively (R. 22, 28).

II

JURISDICTION

This is an appeal under 28 U.S.C. §§ 1253 and 2101 (b) from a final judgment of the district court entered August 9, 1960, which set aside an order of the Interstate Commerce Commission (R. 159). Notice of appeal was filed October 7, 1960 (R. 185). Probable jurisdiction was noted February 20, 1961 (R. 186).

III

STATUTES INVOLVED

This appeal involves the construction to be given the August 22, 1957 amendments to §§ 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), 71 Stat. 411, and whether § 209(b) as amended is to be so construed as to exclude therefrom the mandate of the National Transportation Policy, 49 U.S.C. preceding § 1, 54 Stat. 899. These statutory provisions as formerly written and, where applicable, as amended, are set forth in the Appendix attached hereto.

IV

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission is required as a matter of law to disregard the availability of adequate common carrier service in determining whether a grant of a permit to a motor contract carrier would be consistent with the public interest and the National Transportation Policy.

2. Whether the district court erred in finding that adequacy of existing motor carrier service may not be weighed by the Interstate Commerce Commission in considering (a) the effect which granting the permit would have upon the services of protesting carriers, and (b) the effect which denying the permit would have upon the shipper.

3. Whether, the Interstate Commerce Commission having made a factual finding supported by substantial evidence that the service required by the shipper could be provided by a common carrier, the district court committed error by substituting its judgment for the Commission's in making a finding of fact to the contrary.

V

STATEMENT OF THE CASE

A. The Controlling Facts

The Interstate Commerce Commission denied an application which sought a contract carrier permit authorizing the transportation by motor vehicle of airplane parts, uncrated (R. 63), or "assemblies" (R. 64), from Indianapolis, Indiana, to Wichita, Kansas, (R. 59-60). The application was actively opposed by U.S.A.C. Transport, Inc. [hereinafter called USAC] (R. 60), a common carrier (R. 150) by motor vehicle specializing in the transportation of aircraft, aircraft engines, and aircraft parts (R. 148-149, 152-155, 157). Other protestants included the Atchison, Topeka and Santa Fe Railway Company, which handled the traffic in 1956 (R. 138), and Daniel Hamm Drayage Company [hereinafter called Hamm], a motor carrier experienced in hauling aircraft components (R. 133) which, with protestant Belger Cartage Service, Inc., [hereinafter called Belger] offers a through, joint-line service with Hamm's vehicles (R. 127, 132).

Applicant is presently transporting landing gear bulkheads under temporary authority issued to it by the Commission (R. 64-65, 81, 99), and uses a trailer especially modified to accommodate the commodity (R. 68-72, 81, 141-145). Loading and unloading are accomplished by the consignor and the consignee, respectively (R. 74, 81, 93). Lifting equipment is supplied at origin by the consignor (R. 75).

A truckload, consisting of 4 bulkheads, weighs about 5500 pounds and is valued at approximately $97,290. The consignee, Boeing Airplane Company [hereinafter called Boeing], knows in advance when shipments are to move (R. 102), and schedules them to arrive at Wichita for installation in designated aircraft (R. 86). Although Boeing admitted that USAC has equipment which might be used to transport bulkheads (R. 103) and Boeing would be willing to work with a carrier other than appellee to accomplish modification of trailers (R. 103), it will not use a common carrier because it believes that a common carrier cannot lawfully dedicate a trailer to the exclusive use of one shipper (R. 97, 103).[1] Also, USAC has no office at the destination point, Wichita (R. 101). It does have one at the origin point (R. 115).

The Boeing witness expressed discontent with the service of USAC on the ground that a component handled by that carrier in 1953 [4 years before the hearing] became unbolted from its shipping fixture while in transit. The hearing examiner shut off cross-examination by USAC's attorney respecting the incident on the ground that it was remote as to time. Although USAC has not been allowed by Boeing to transport the instant traffic (R. 104-105), the carrier was asked by Boeing to obtain emergency authority to handle Boeing traffic at Seattle,

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[1] A common carrier is not proscribed from using a vehicle to serve just one shipper, so long as it offers such a service to all on equal terms.

Washington (R. 117). The Hamm-Belger joint-line service has not been tried by Boeing (R. 94-95). No damage had been experienced by Boeing on either rail or truck shipments up to the time of the hearing (R. 124).

The equipment of USAC, which carrier has transported similar articles (R. 113), can be modified to handle the instant shipments (R. 112). USAC estimates that modification to specification would take ten days to two weeks (R. 117-118). It maintains a terminal at the origin point, Indianapolis (R. 115). The USAC tariff provides that the determination of equipment to be used will rest exclusively with the carrier (R. 120).

Protestant Hamm participates in the business of hauling aircraft components (R. 133). At the time of hearing it had three airplane trailers idle (R. 132). Hamm interchanges equipment with protestant Belger and each is willing to participate in a joint-line through service to transport the instant traffic (R. 127, 132).

B. The Course of Litigation Below

The report and order recommended by the hearing examiner (R. 15-21) concluded, "* * * that a need has been shown for the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent." (R. 19-20). Upon the filing of exceptions and replies thereto, Division 1 of the Commission issued a report dated January 31, 1958 (R. 22-27). Therein it was concluded that the supporting shipper had not used the service of existing motor carriers [USAC and Hamm-Belger] shown by the record to exist (R. 26), that the untried services had not been shown to be "inadequate" (R. 26), and that a "service not needed cannot be found to be consistent with the public interest or the National Transportation Policy." (R. 27).

In due course the Commission on reconsideration issued a further and more detailed report dated June 15, 1959 (R. 29-53). That report, upon reviewing the background

to the 1957 amendments (R. 35-41) and measuring the record against the factors added to § 209(b) by those amendments (R. 45-48), concluded that J - T had not satisfied its burden of proof as an applicant (R. 49-50). The Commission also concluded that it had a positive duty to consider any relevant matters embraced by the National Transportation Policy (R. 43), and that, therefore, the specific factors set forth in amended § 209(b) were not all-inclusive and did not preclude consideration of other factors which may in a particular case effect the public interest and the National Transportation Policy (R. 48).

Following the filing of a complaint (R. 1-15) by applicant in the United States District Court for the Western District of Missouri, Western Division, on August 21, 1959, that Court found the Commission's order unlawful and void, remanding the case to the Commission for further proceedings consistent with the Court's decision (R. 179). There are thus raised the questions earlier stated.

C. The Decision of the District Court

In this proceeding the Interstate Commerce Commission, charged by Congress with the responsibility for determining whether the grant of a contract carrier permit will be "consistent with the public interest and the national transportation policy", has taken into consideration the question of whether the services of existing common carriers are adequate. This factor has been determined by the Commission to be appropriate for use in measuring consistency with the public interest almost from the beginning of its regulation of the motor carrier industry.[2]

The 1957 amendments to §§ 203(a)(15) and 209(b) of the Interstate Commerce Act added several specific criteria which the Commission is thereby required to con-

[2] See *C. & D. Oil Co. Contract Carrier Application*, 1 M.C.C. 329 (1936).

sider in applying the basic statutory standard of consistency with the public interest and the National Transportation Policy. We are now confronted by a District Court decision concluding that adequacy of existing carrier services is no longer a valid consideration in measuring a contract carrier permit application against the public interest and the National Transportation Policy, even though at least two of the new specific criteria clearly embrace that factor.

Justification for this position is sought in the legislative history of the 1957 amendments. There it is shown that an additional clause was eliminated from the original proposal. If enacted, this clause would have curtailed the breadth of the Commission's area of discretion by requiring *denial* until and unless a contract carrier applicant had affirmatively proved that existing carriers were "unable and unwilling" to provide adequate service. The fact that the restrictive clause was eliminated from the amendments a originally proposed is now seized upon by appellees as the basis for several unsound propositions. All were adopted by the District Court. These include:

(1) That the statute as it now exists is so ambiguous as to require inquiry into the legislative history of §§ 203(a)(15) and 209(b) in order to permit reasonable interpretation thereof;

(2) That, by withdrawing the proposed requirement which would have limited the Commission to approval of contract carrier permits only where an applicant had shown existing carriers to be "unwilling or unable" to provide the service needed, Congress took from the Commission the power to consider, where appropriate and at the Commission's discretion, adequacy of existing motor carrier service;

(3) That, by eliminating from the amendment as proposed the clause restricting the Commission's area of discretion, Congress sought to and did materially change (so as to lighten) the burden of proof placed

upon a contract carrier applicant by the legislative standard as formerly provided;

(4) That all considerations involving the public interest and the National Transportation Policy, save those specifically set forth in § 209(b), as amended, have now been excluded from determination of contract carrier applications.

VI

SUMMARY OF ARGUMENT

In 1957 certain amendments to the Interstate Commerce Act modified the definition of contract motor carriers in § 203(a)(15), and added to § 209(b) specific elements to be considered by the Commission in determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy. The elements enumerated for consideration are as follows:

> "• • • the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. • • •"

These appellants urge that the Commission in making its determination whether a permit should issue under the Act as amended is not required to disregard the availability of adequate common carrier service proffered under a certificate issued by it. The language of the amendment specifically requires that the Commission consider the effect which granting the permit would have upon the service of protesting carriers and upon the applicant's shipper. Patently neither of these could reasonably be evaluated if the Commission disregarded the availability of adequate common carrier service. The specific mandate of the statute is binding upon the Commission and any

suggestion that it disregard the available service of a common carrier is plainly in contravention of the law.

But assuming, arguendo, that in directing the Commission to consider the *effect* which granting the permit would have upon the service of protesting carriers the Congress did not direct it to consider the *availability* of adequate common carrier service, the question arises whether the Commission in its discretion may, nevertheless, do so. "Effect" does not exist in a vacuum, and can be considered only in relation to what is available. Further, it is here asserted that under the terms of the National Transportation Policy the Commission is obliged to weigh every element that in its expert judgment has a bearing upon the national transportation system. It can do no less under the Congressional injunction there set forth "* * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *". Should there be doubt about such authority it is dispelled by the further policy injunction that "All of the provisions of this [Interstate Commerce] Act shall be administered and enforced with a view to carrying out the above declared policy." As was said in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 88 (1957), "This Court has made it clear that this [national transportation] policy is the yardstick by which the correctness of the Commission's actions will be measured."

Congress has recognized the peculiar competence of the Interstate Commerce Commission by reposing in it the duty of regulating transportation in such manner as to achieve the objectives of the National Transportation Policy. Consequently we assert that the lower court erred when it found that the Commission may not weigh adequacy of existing service in considering the effect which granting a new permit would have upon services of an existing carrier. It is axiomatic that the effect upon a

present service of creating a new service cannot be measured unless the Commission evaluates the adequacy or sufficiency of the present service.

And the court below, we assert, is in an even more untenable position when it says that adequacy of existing service may not be weighed by the Commission in considering the effect which denying the permit would have upon the applicant's shipper. This factor or element is one of those specifically enumerated by Congress in the 1957 amendments to be considered in determining consistency with the public interest and the National Transportation Policy. It is obvious that the effect upon a shipper of grant or denial of additional carrier authority cannot possibly be determined without considering the adequacy of present carrier service available to that shipper. If it is adequate or satisfactory or sufficient, any new competitive service may adversely affect it which cannot be said to be consistent with the public interest. And if it is inadequate or unsatisfactory, or insufficient, it is not inconsistent with the public interest to fill the void by creating a new service. The Commission, as the repository of regulatory authority must be allowed to weigh adequacy of existing service as an essential ingredient of the tests.

The conclusions heretofore advanced may be reached from a reading of the clear terms of the statute and without reliance upon the legislative history of the 1957 amendments. But if resort is had to legislative history the same result is achieved. The pertinent 1957 amendments were added to make clearer the distinctions between common and contract motor carriage. Tests theretofore applied by the Commission in determining the "public interest" aspect of additional contract carrier authority were known to Congress and not rescinded. Failure to make additional proposed changes restrictive in nature in their effect upon contract applicants merely broadens the Commission's discretionary authority or, at the very least, does not restrict it.

Finally, the Commission's factual finding that the service can be provided by a common carrier should be left undisturbed since it is supported by substantial evidence. The record contains evidence, discussed at some length in the report, that the protestant carriers provide service identical with that proposed, and operate equipment designed, or to be modified, to handle the particular types of shipment to be proffered. In the face of this ample evidence, and of the Commission's discussion thereon, it was error for the court to substitute its judgment on the facts.

VII

ARGUMENT

A. Consideration of Adequacy of Existing Service Not Only Permisible, But Required

Public Interest Contemplates Consideration of Adequacy

Essentially, the instant controversy involves a dispute as to whether the Interstate Commerce Commission in denying a request for contract carrier authority has exceeded its discretionary powers as delineated by the legislative standard laid down by Congress for application in such matters. Stated more specifically, may the Commission within that standard (consistency with the public interest and the National Transportation Policy) consider the adequacy of existing motor carrier service. In resolving the issue, it is helpful at the outset to recall the broad range of discretion recognized by this Court to be lodged in administrative agencies.

It is well settled that the term "public interest" standing alone is in itself sufficient as a legislative standard. *Avent* v. *United States,* 266 U.S. 127 (1924); *United States* v. *Chemical Foundation,* 272 U.S. 1 (1926). Although arising under § 5 of the Interstate Commerce Act, the Court's decision in *New York Central S. Corp.*

v. *United States*, 287 U.S. 12 (1932), contains a revealing discussion of the meaning of the term "public interest." There it stated that:

> "• • • The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but *has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, *the question is not essentially different* from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and *to the issue of certificates of public convenience and necessity.*" [287 U.S. 25] (Emphasis supplied)

It was also recognized that by use of the aforementioned standard:

> "• • • The question whether the acquisition of control in the case of competing carriers will aid in *preventing an injurious waste* and in securing more efficient transportation service *is thus committed to the judgment of the administrative agency upon the facts developed* in the particular case." [287 U.S. 26] (Emphasis supplied)

The term "public interest" not only is irrevocably associated with considerations of adequacy of service, but, as well, the area of permissible inquiry by the administrative agency seeking to measure the "public interest" is recognized as broad.

Broad Interpretation Under Other Statutes

One of the landmark cases in this general field is *Federal Power Comm.* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). There Congress had provided that certain natural gas rates regulated by the Federal Power Commission should be "just and reason-

able", but no express formula was provided for reaching the required determination. It was held that the Commission was not bound to any formula or combination of formulae in order to comply with the legislative standard [320 U.S. 602]. It is the result reached, not the method employed which is controlling. This Court there held that, "• • • the product of expert judgment • • • carries a presumption of validity." [320 U.S. 602].

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the legislative standard laid down by Congress to guide the Federal Communications Commission in the exercise of its licensing power was the "public convenience, interest or necessity," certain specific criteria being set forth in § 307(b) of the Communications Act [47 U.S.C. 307(b)]. The standard of "public interest" was found not to be vague [319 U.S. 225-226] and despite the specific criteria wide discretion was recognized to have been placed in the administrative agency through the legislative standard adopted by Congress.

Even in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), wherein a decision of the F.C.C. was overturned, wide latitude was recognized in the hands of the administrative agency when applied within the sphere of its own expertise. There, where the agency sought to license one of two competitors on the ground that it was national policy to encourage competition, the Court in rejecting the agency action nevertheless stated that the result reached would have been valid, "[h]ad the Commission clearly indicated that it relied *on its own evaluation of the needs of the industry* rather than upon what it determined a national policy • • •." [346 U.S. 94] (Emphasis supplied) It was found that competition might be allowed, whenever *the Commission* finds "that tangible benefit to the public would be derived from the authorization" [346 U.S. 89], but "• • • the Commission must at least warrant, as it

were, that competition would serve some beneficial purposes such as maintaining good service and improving it." [346 U.S. 96-97].

Consideration Permissible Under Legislative Standard

It is clear from the foregoing that where broad legislative standards are laid down by Congress to guide an administrative agency in the exercise of its functions, the agency may consider and give weight to factors or elements reasonably embraced within that standard. What is appropriate may well vary from case to case. But so long as the factors or elements considered are consistent with the standard and with the purpose and policy of the act administered, and do not fall into areas outside the expertise of the agency, any material and relevant factor developed of record will not be found to be inappropriate. In short, the range of administrative discretion is broad. That of the Interstate Commerce Commission is no exception.

In *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), the Commission's action in granting a certificate of "public convenience and necessity"[3] to a rail affiliate was under attack. There the Court said that:

> "* * * The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience

[3] With respect to the scope of administrative discretion, there is no difference in approach based upon whether a standard is laid down in terms of "public convenience and necessity" or "consistency with the public interest." Indeed, in *American Trucking Associations* v. *United States*, 355 U.S. 141, 149-150 (1957) it was expressly recognized that where within the "public interest" under § 5 of the Act a railroad might obtain control of a motor carrier operation only if such operation could be used to benefit in the railroad operation, the policy thereby expressed would generally be applied as well in matters arising under § 207 of the Act where the legislative standard involved "public convenience and necessity." See also *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1, 7 (1960).

and necessity. Cf. Powell v. United States, 300 US 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. McLean Trucking Co. v. United States, 321 US 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *" [326 U.S. 65]

Referring to the National Transportation Policy and the broad generalizations contained therein, the Court said:

"* * * In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress." [326 U.S. 66]

It was further stated that the Commission:

"* * * is in a position to determine by its administrative discretion whether the projected service may be better rendered by the railroad or existing motor carriers. * * *" [326 U.S. 72-73]

Consideration Required by National Transportation Policy

Moreover, in a concurrent decision, *American Trucking Asso.* v. *United States*, 326 U.S. 77 (1945), the interest of the public was specifically tied to consideration of the effect of the proposal upon other carriers. In finding that, "* * * the Commission should have admitted evidence of the flow of traffic by truck * * *", the Court stated that the problem of whether to grant a certificate to rail subsidiaries could be solved only after receipt of evidence as to the probable effect of the proposal on protesting motor carriers [326 U.S. 85, 86].

It is fair to conclude that while, on the one hand, there rests in the Commission wide latitude in the selection of factors or elements to which it may give weight, its administration of the Act, on the other hand, must always be accomplished with full regard to the National Transportation Policy. In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), the Court stated that:

> "The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured • • •. [pages 87-88]
>
> • • • •
>
> "• • • since the findings • • • do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said." [page 92]

See also *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1, 11 (1960); *Eastern-Central M. C. Assoc.* v. *United States*, 321 U.S. 194, 206 (1944); *American Trucking Assos.* v. *United States*, 355 U.S. 141, 152 (1957).

The district court's decision is thus framed by this situation: (a) On the one hand, the Commission is accorded great latitude in considering factors which shed light on the public's interest, here exercised by considering the adequacy of service offered by existing carriers; and (b) on the other hand, Congress actually *required* such consideration in view of its mandate that the Commission, "• • • promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers • • •." Such service and such conditions are not promoted or fostered by licensing new carrier operations to perform a service which could be adequately rendered by existing carriers.

Recent Court Decisions

Several Court decisions issued since August 22, 1957, bear upon propriety of the Commission's grant or denial of contract carrier applications. The most illuminating is that of this Court in *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1 (1960). There the Commission's *grant*

of a permit to a rail-controlled motor carrier was successfully attacked. It was found that the Commission's decision had failed to take into consideration general policy firmly intrenched in the law and implemented through a series of Commission decisions into a set of reasonably concrete standards [364 U.S. 7]. This Court once again commanded[4] that the Commission *must* take cognizance of the National Transportation Policy and apply the Act "as a whole." [364 U.S. 11]. The district court in the instant case denied the Commission the power to do just that.

Moreover, in the *American Trucking* case, specific comment was made that the policy of the act does not allow issuance of a permit simply because a shipper wants a contract carrier service [364 U.S. 15]. These appellants submit that the supporting shipper here evidenced nothing stronger than such a desire, as distinguished from an actual need.

It seems clear that the *American Trucking* case negates the theory advanced by appellees and accepted by the district court that the 1957 amendments severed § 209(b) from any connection with criteria, tests or standards developed and applied in precedent cases arising prior thereto. This Court has reaffirmed the command to the Commission that it must take full cognizance of the National Transportation Policy and apply the Act "as a whole"—not confined exclusively to the narrow limits of the criteria added to § 209(b).

Similarly, in *Bass* v. *United States*, 163 F. Supp. 1, 3 (W. D. Va. 1958), aff'd 358 U.S. 333, rehearing denied 359 U.S. 956, a contract carrier applicant had been denied authority to perform a charter service which common carriers of passengers were already authorized to perform. There the court stated that:

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[4] Specific acknowledgment was made of the 1957 amendments, see 364 U.S. 13, footnote 9.

> "• • • However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that, even though a particular type of charter service is made adequately available by common carriers, the Commission must nevertheless authorize duplicate service, whenever the same is tendered, by contract carriers who are not common carriers. In other words, we do not believe that Congress, in laying down its national policy, meant that, notwithstanding the existence of adequate contract charter service by common carriers, the Commission is still compelled to allow duplicate facilities by one who offers contract service exclusively.
>
> "We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interests and the national transportation policy."

It is clear from the above that the court relied on the validity of the adequacy doctrine in upholding the decision of the Commission.

A similar case arose in the United States District Court for the Eastern District of Virginia, Civil Action No. 2023, *Alexandria, Barcroft & Washington Transit Company and Washington, Virginia and Maryland Coach Company, et al.* v. *United States of America and Interstate Commerce Commission,* July 10, 1961. There, plaintiff common carriers contended that the Commission had erred in granting a contract carrier permit to perform charter passenger service because it did so in the mistaken belief that, as a matter of law, plaintiff common carriers could not provide the service required by the customer [The United States Government]. In upholding the plaintiff's view of the case, the District Court[5] by decision dated

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[5] SOBELOFF, Chief Circuit Judge, HAYNESWORTH, Circuit Judge, and BRYAN, District Judge.

July 10, 1961, observed as follows:

> "The upshot of the statutory definitions and the transportation policies, noted earlier, is that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy in the case, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it."

B. Amendment To Section 209(b) Did Not Exclude Adequacy Of Existing Service

Section 209(b) is Clear And Unambiguous

The validity of the adequacy of existing service doctrine as applied in appropriate cases has never, to the knowledge of these appellants, been successfully challenged. It had become an accepted part of our transportation law long before August 22, 1957. Congress must be presumed to have known of this application of the standard of consistency with the public interest and the National Transportation Policy. The question then is whether the amendments to §§ 203(a)(15) or 209(b) taken singly or in combination so changed that law as to exclude application of the adequacy doctrine in contract carrier application cases.

The legislative standard set forth in § 209(b), as amended, is as follows:

> "* * * Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall

> be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. • • • "

It is the belief of these appellants that the statutory provision set forth above is clear and unambiguous and "is the best expositor of itself."[6] Thereby, there can be no need to inquire into the legislative history of the amendment for it is well settled that legislative history may not be used to vary the plain meaning of an act.[7]

The term "public interest" and the National Transportation Policy are both well understood. Therefore, as those terms are used in § 209(b) they are to be applied according to their plain and accepted meaning and resort may not properly be had to legislative history for the purpose of drawing inferences which are at odds with that plain meaning. See, *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Packard Motor C.* v. *National Labor Relations Board*, 339 U.S. 485 (1947); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); and *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953).[8]

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[6] *Pennington* v. *Coxe*, 6 U.S. 33, 2 Cranch 33, 52 (1804).

[7] *United States* v. *Missouri P. R. Co.*, 278 U.S. 269, 278 (1929).

[8] And see *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945) where this Court said:

> "This argument from the legislative history undertakes, in effect, to contradict the terms of § 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which

The basic standard governing contract carrier applications set forth in § 209(b), as before, is whether the proposal will be "consistent with the public interest and the National Transportation Policy." The effect of the decision of the district court is literally to read out of § 209(b) the mandate of the National Transportation Policy even though that Policy is an explicit part of the basic statutory standard. This constitutes a change in the law which only Congress has the power to accomplish.

In a number of cases this Court has insisted that the Commission constantly approach regulation under the Act with scrupulous attention to the dictates of the National Transportation Policy.[9] Yet, the district court held that in specifying five or six criteria to be considered in determining consistency with the public interest and the National Transportation Policy Congress precluded consideration of any other elements regardless of the mandate of the Policy to administer and enforce the Act in light of its objectives. In substance, then, the district court held that the specific criteria set forth in § 209(b) constitute the entire scope of the public interest and the National Transportation Policy insofar as contract carrier applications are concerned. These appellants submit that so sweeping a change through the device of statutory construction may not properly be permitted. It is contrary to reason to assume that Congress would sharply curtail the scope of the National Transportation Policy in proceedings under § 209(b) while leaving it unchanged with

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finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. * * *"

[9] See *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), and *American Trucking Associations* v. *United States*, 364 U.S. 1 (1960).

respect to every other section of the Interstate Commerce Act. Accordingly, the district court erred in holding that the Commission may not consider the adequacy of existing carrier service in determining whether or not a contract carrier application would be "consistent with the public interest and the National Transportation Policy."

Prescribed Criteria Require Consideration Of Existing Service

At this juncture it must be pointed out that the district court in holding that the Commission may no longer consider adequacy of existing service necessarily assumed that in the case at bar the Commission held that merely because common carrier service was available no contract carrier service would be authorized. This is not an accurate appraisal of the Commission's decision. The Commission specifically found that the applicant's proposal constituted contract carriage (79 M.C.C. 706, R. 44-45). Then, in applying the public interest standard of § 209(b), including the specified criteria, the Commission found that the reasonable transportation needs of the shipper could be adequately met by the available service of existing common carriers and did not require the service proposed by the applicant. Thus, it is not the mere availability of common carrier service that warranted denial of the application, but rather it was the fact that the shipper's reasonable transportation requirements could be adequately met by such available service.

When the case is reviewed in proper prospective it becomes clear that adequacy of available service is necessarily included in at least two, and perhaps three of the criteria specified in § 209(b). Stated in simplified form the criteria are:

(1) The number of shippers to be served,
(2) The nature of the service proposed,
(3) The effect which granting the permit would have upon the service of protesting carriers,

(4) The effect which denying the permit would have upon (a) the applicant, and or (b) the shipper, and
(5) The changing character of the shipper's requirements.

With respect to the second criterion, "nature of service proposed," it is apparent that in order to consider the nature of the proposed service in relation to the public interest and the National Transportation Policy, consideration must be given to the shipper's transportation requirements and the nature of the available transportation service. To do otherwise would be to attempt to determine the public interest in a vacuum.

The third of the prescribed criteria is that the Commission shall consider the effect that granting a permit would have upon protesting carriers. Plainly, because all of the criteria are set forth simply as considerations to be made by the Commission in determining consistency with the public interest and the National Transportation Policy, the evaluation by the Commission of the effect upon protesting carriers must be in terms of the public interest and the Policy. Therefore, such consideration must of necessity include an evaluation of the shipper's transportation requirements and the adequacy in light of those requirements of the available service of protesting carriers. To fail to so evaluate the effect upon protesting carriers of a grant of a permit would render this criterion substantially meaningless. Indeed, the very inclusion of this criterion in the 1957 amendments to § 209 (b) is indicative of Congressional approval of the long line of Commission decisions holding that existing carriers are entitled to an opportunity to transport all traffic which they can handle adequately and efficiently before new operations will be authorized.

If the Commission, in summary fashion, granted all contract carrier applications without considering whether the service for which authority is sought is actually pro-

vided by or available from existing common carriers, as the district court would apparently have it do, the granting of each such permit would be an effective removal of actual or potential traffic from the common carrier system. Moreover, if existing common carrier service is eliminated from the Commission's considerations, the inevitable result can only be summary approval and issuance of such permits. At each industrial facility, at each commercial house, contract carriers could obtain new authority on the theory that the existence of adequate common carrier service does not negative the creation of a new and competitive contract carrier service. The result could only be an administration of the Interstate Commerce Act precisely contrary to the basic motives and purposes underlying the passage of that Act and clearly stated in the National Transportation Policy. If the Commission is required to permit the persistent whittling away of common carrier traffic, actual or potential, through the granting of contract carrier permits regardless of the availability of common carriers to serve the same shippers, that agency could not possibly discharge its duty to foster sound economic conditions in transportation.

Neither under the Interstate Commerce Act as amended in 1935 (49 Stat. 543) nor under the 1957 amendments to the contract carrier provisions thereof, does there appear language warranting the pyramiding of new authority so as to jeopardize carriers already authorized by the Commission. The very passage of the law requiring government licensing before new for-hire operations in interstate or foreign commerce may be instituted is in itself persuasive that the economic health of presently certificated or permitted motor carriers is important to the nation. That idea finds specific expression in the National Transportation Policy.

Our fluid and dynamic economy constantly changes the location of factories and plants. Construction of a new

plant here often means the closing there of a plant long served. New commodities, new products constantly replace the old and familiar. Potential traffic thus becomes as important as traffic presently enjoyed. Today's potential becomes tomorrow's reality. The considered traffic may be academically "potential" to U.S.A.C., but since its imbalance of traffic causes it to "deadhead" its vehicles empty westbound from the origin terminal, Indianapolis (R. 116), the failure to be accorded an opportunity to transport the considered traffic is altogether present and real.

As the Commission said in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748, 752-753 (1953):

> "A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service." (Aff'd.—*Smith & Solomon Trucking Co.* v. *U.S.*, 120 F. Supp. 277 (1954).)

Never has such a narrow and shortsighted view as that adopted by the court below been countenanced by the Commission or the courts. Indeed, the Act must be construed with due regard to its purpose.[10] Particular portions of an act should not be read *in vacuo*, but should be considered as a part of the whole with due regard to the overall purpose.[11]

Finally, the fourth criteria, i.e., the effect which denying a permit would have upon the shipper, also requires consideration by the Commission of the adequacy of service already available to the shipper. Thus, where the facts

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[10] *Keystone Transp. Co. Cont act Carrier Application*, 19 M.C.C. 475, 492 (1939); *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

[11] *Koppers Conn. C. Co.* v. *Jas. W. B. Line*, 89 F. 2d 865 (1937).

reveal the availability to a shipper of an existing motor carrier service which can adequately meet the shipper's reasonable requirements it is fair to conclude that a denial of a permit would not materially affect the shipper. On the other hand, if the facts revealed that an existing service could not meet the shipper's reasonable requirements, the fair conclusion would be that a denial of a permit would materially and adversely affect the shipper. But, if the Commission is forbidden to evaluate the quality of service available to a shipper how can it make any meaningful determination of the effect upon that shipper of the denial of a contract carrier permit?

Pursuant to § 209(b), as amended, and particularly its plain requirement that the grant or denial of a contract carrier permit rest upon the Commission's determination of consistency with the public interest and the National Transportation Policy, it is manifest that where a proposed contract carrier service is of a type or character consistent with common carriage, those carriers currently in a position to serve a shipper should be given an opportunity to do so. Where common carrier service is shown to be available and suited to the reasonable transportation needs of the shipper a prerequisite to approval of a contract carrier application is that the available service was tried and found wanting. Nor may the required actual or potential loss of traffic, as a test of the effect on protesting carriers, be so great in any single case as to cripple the existing service. For to so hold would be to allow such crippling effect, ignoring each individual case on the theory that no one blow is fatal. Yet, in the aggregate the result could only be a weakening of the national transportation system in direct contravention of the Congressional mandate as set forth in the National Transportation Policy.

National Transportation Policy Includes Adequacy

Moreover, in addition to the foregoing, the factor of adequacy of existing carrier service is also clearly found in the National Transportation Policy itself. This Congressional declaration demands that the Commission "* * * promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *." Even prior to the adoption of the policy in its present form [12] the Commission equated the proposition stated above with adequacy of service. In *Podolsky Contract Carrier Application*, 2 M.C.C. 653, 654 (1937), it was stated:

> "* * * In the consideration of contract-carrier applications we have frequently said that, *in order to foster sound economic conditions* [13] in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them." (Emphasis added)

Clearly, where it is established that existing carriers are in a position to provide a required service the quoted objectives of the Policy demand that they be afforded an opportunity to do so before a new service is created.

C. Legislative History Demonstrates That No Change In Statutory Standard was Intended or Accomplished

While these appellants assert that disposition of this case can and should be made without reference to legis-

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[12] Prior to adoption of the National Transportation Policy in 1940 very similar language appeared in § 202(a) of the Act, 49 U.S.C. § 302(a), 49 Stat. 543.

[13] This language carries over to this day in the National Transportation Policy enacted *after* this and similar decisions, demonstrating the manner in which the adequacy doctrine is tied so closely to that Policy.

lative history they likewise assert that an examination of that history will demonstrate that no change in the standard was intended or accomplished. This means that adequacy of existing service as a factor, embraced within the public interest and the National Transportation Policy, was not intended to be excluded by Congress in the 1957 amendments. The court below takes a contrary view. (R. 167, 173)

Impetus for the 1957 amendments was found in the decision of this Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956) and initiative for amending the statute was assumed by the Commission itself. In both its 69th and 70th Annual Reports, (1955 and 1956) the Commission recommended amendments dealing with contract carriage. Insofar as is here pertinent, the Commission's original recommended amendments to Sections 203(a)(15) and 209(b) were as follows:[14]

> "(1) By changing paragraph (15) of section 203(a) thereof (49 U.S.C. sec. 303(a)(15)), to read as follows:
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> '(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.';
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> • • • •
>
> "SEC. 2. Part II of such Act is further amended by inserting between the words 'thereunder,' and 'that' in the second sentence of section 209(b) (49 U.S.C. 309(b)), the following: 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' • • • "

[14] S. 1384, 85th Cong. 1st Sess.

The purpose of the Commission in recommending such changes is found in the testimony of former Chairman Clark at hearings held on the bill introduced at the instance of the Commission. There, Mr. Clark said:[15]

> "Under existing law, even though the initial grant of authority may have been based on a showing of need for individual specialized service, there is no assurance once a permit has been granted against a contract carrier actively competing with and supplanting common carriers by subsequently adding a large number of contracts with other shippers. In this connection the Supreme Court recently stated in *U. S. v. Contract Steel Carriers*, decided just a year ago, that a contract carrier is free to aggressively search for new business within the limits of its license. This decision has also cast considerable doubt on the correctness of the Commission's interpretation of the act as to specialization. Freedom to solicit customers without restriction as to specialized service would tend to obliterate the distinction which Congress intended to make between common and contract carriers. The amendments proposed in the bill would enable the Commission to give greater effect to Congressional purpose, first by amending the definition of contract carrier by motor vehicle to state clearly that the transportation services furnished by such carriers are to be of a special and individual nature for one or a limited number of persons and which are not provided by common carriers.
>
> "Two, by specifically providing in section 209 (b) that the Commission, in granting contract carrier authority, may include terms, conditions, and limitations respecting the person or persons or the number or class for which a common carrier may perform transportation services, as may be necessary to assure that the business conducted by the permit holder is that of a contract carrier and within the scope of its permit.

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[15] **Hearings, Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, U.S. Senate, 85th Cong., 1st Ses., On S. 1384 And Other Bills, pp. 23-24.**

> "Third, by removing from the proviso in section 209(b) the prohibition which prevents the Commission from limiting the number of effective contracts which a contract carrier may have under its permit. The recommended amendment to section 212 is in the nature of a grandfather clause authorizing the Commission to issue a certificate in lieu of a permit without proof of convenience and necessity, where it finds that the operations of existing permit holders do not conform to the revised definition, are those of a common carrier and are otherwise lawful."

It is obvious from the recommended language of the Commission and from the testimony of its spokesman that it sought no change in the basic legislative standard to the effect that prior to issuance of a permit the proposed operation must be shown to be "consistent with the public interest and the National Transportation Policy."

The measure encountered vigorous opposition, particularly by the Contract Carrier Conference, an appellee here. It should be observed, however, that opposition of that Conference was not directed to the Commission's stated purpose, but against the inclusion of language recommended by the Commission and which the Conference, later joined by the Commission, deemed unnecessary to the accomplishment of the Commission's stated purpose. Further reference to the legislative history will establish the accuracy of this analysis.

In the hearings before the Senate Subcommittee on Surface Transportation on S. 1384, the Contract Carrier Conference was represented by its General Counsel, who also represents that Conference in the instant proceeding. Certain of the statements of the witness are particularly illuminating at this juncture.

At pages 299-300 of Hearings, Before A Subcommittee of The Committee on Interstate and Foreign Commerce, U. S. Senate, on S. 1384, the Contract Carrier Conference General Counsel said:

"• • • Now, in addition, Mr. Chairman, to the suggestion that we thought would be helpful to the Commission [dealing with limitations in contract carrier permits and grandfather provisions], we had a suggestion that we thought would be helpful to the contract carriers. As I have stated before, the contract carrier must obtain a permit from the Interstate Commerce Commission. The suggestion that we have made, both before this committee and before the Commission, would limit contract carriers rather than provide for any expansion, so that we felt that section 209(b), the section of the law under which the Commission may grant a new contract-carrier permit, or the extension of a permit, if it is shown that the service proposed is consistent with the public interest and the national transportation policy.

"*We do not suggest any change in that standard.* The only thing we have suggested in that connection is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out, and I have put into my statement the exact language which we have suggested, that the primary thing that we have always felt the Commission should do in those cases is *consider not only the effect of granting this authority on the common carrier—they do that in each and every case*—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration • • •." (Emphasis added)

At page 303 of Hearings, supra, the General Counsel said:

"S. 1384 would amend section 209(b) in such a way as to make it necessary for any contract carrier seeking new or extended authority to prove that the service proposed was one that common carriers were unwilling or unable to perform. Such requirement would, for all practical purposes, put to an end any extension of contract carrier services, for in practically every instance where a contract carrier seeks either new or extended rights, opposing common car-

riers oppose the application alleging that they are willing and able to perform the proposed service. Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing common carriers, to prove that such carriers were unable to perform a given service."

The foregoing makes clear that the Contract Carrier Conference sought no change in the standard applicable to contract carrier applications. The witness for the Conference called attention to the fact that under the then-existing standard, the Commission had always considered the available common carrier service and urged only that *in addition* to such consideration the Commission should also be required to consider the effect of denial upon the applicant.

The Conference in that testimony objected to the more restrictive language proposed for inclusion in the definition of contract carriage and to the strict limitation that a permit should be issued only if existing common carriers were shown to be unable or unwilling to provide the service regardless of the public interest. The Commission concurred as will now be shown.

With respect to the described objectionable language proposed for amending § 209(b), former Chairman Clarke testified at pages 21-22 of Hearings, supra, as follows:

"• • • As drafted, S. 1384 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point, that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Com-

> mission, upon further consideration, has voted to withdraw its recommendation to amend Section 209(b) in this respect. * * * "

And with respect to the similar language contained in the recommended amendment to § 203(a)(15), Chairman Clarke wrote the Subcommittee under date of May 21, 1957, as follows: [16]

> "You will recall that the Commission recommended during the hearing that S. 1384 be amended by removing the requirement of a showing that existing common carriers are unwilling or unable to render the required type of service. Upon further consideration, the Commission has unanimously voted also to recommend that the words 'and not provided by common carriers' be deleted from line 6 of page 2 of the bill. These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized services."

The position of the Interstate Commerce Commission in the court below and before this Court is consistent with that taken by it before the Senate Committee. On the other hand, the Contract Carrier Conference in the court below, and in its motion to affirm herein, takes the position that by deleting the language referred to, the Congress substantially changed and limited the nature of Commission consideration of a contract carrier application.

Appellants urge that deletion of the language found objectionable by the contract carriers had only the effect of maintaining in *status quo* the burden of contract carrier applicants and left the broad scope of the Commission's consideration in such cases precisely the same as it was previously. We respectfully urge that for the Contract Carrier Conference now to take a position that the considerations to be weighed by the Commission in

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[16] Hearings, pp. 43-44, supra.

determining consistency "with the public interest and the National Transportation Policy" are limited or restricted is a reversal of the position taken before the Senate Committee and is not warranted by the legislative history.

If more is needed to establish Congressional intent a reference to the Senate Committee report [17] accompanying S. 1384 is illuminating. Concluding the main body of its report the Committee said:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

The background of the 1957 amendments considered, we respectfully submit that (a) there was no change in the basic standard governing contract carrier applications, (b) there was no intention whatever to curtail the discretion of the Commission in applying that standard, and (c) at most the intention was to insure consideration in all cases of the matters specified in the amendments.

D. The District Court Substituted Its Judgment For That Of The Commission

The court below, in reversing the Commission, concluded that the Commission had placed upon applicant the burden of proving the service of existing carriers inadequate in violation of § 209(b), as amended. The court said (R. 170):

> "• • • The Commission goes beyond the language and scope of the statute when it assumes and requires:
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> "(a) That applicant carries the burden of showing that existing services are inadequate; • • •"

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[17] S. Rep. No. 703., 85th Cong., 1st Ses., p. 7.

The statement of the Commission in its decision with respect to the question of burden of proof is illuminating and reads: (R. 47)

> "Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary the very business of U.S.A.C. is the transportation of the type of traffic involved."

Thus, it is seen that the Commission has expected existing carriers to come forward—as did U.S.A.C. here—and demonstrate their ability to provide an adequate service for the subject transportation. The district court erred in viewing as a question of burden of proof what is at most a matter of going forward with the evidence which necessarily shifts in the course of a hearing.

Under § 209(b), as amended, one of the criteria which the Commission is required to consider in determining consistency with the public interest and the National Transportation Policy is "the effect which granting the permit would have upon the services of the protesting carriers." It must be observed that the statute does not speak in terms simply of existing carriers, but rather speaks in terms of "protesting" carriers. Thus, an existing carrier clearly has the burden of proving the quality of its own service. If it does so, the burden of going forward with the evidence, i.e., the burden of rebutting evidence adduced by a protesting carrier, shifts to the applicant. In the case at bar U.S.A.C. did actively intro-

duce evidence and carry its burden of proof in demonstrating the nature of its existing service. The applicant failed to rebut or overcome that evidence and on that basis the Commission found that existing service was not shown to be inadequate (R. 47). There is no warrant for the assumption made by the court below that the Commission placed upon the contract carrier applicant the *initial* burden of proving existing service inadequate.

Moreover, the court below compounded its error by substituting its judgment for that of the Commission with respect to a material question of fact as to which the Commission's finding is supported by substantial evidence. The court said (R. 177):

> "* * * The Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier * * *"

The rationale of the district court is not entirely clear. However, the court appears to have harbored the erroneous thought that a common carrier cannot provide specialized transportation service needed by a supporting shipper. The Commission on the basis of substantial evidence of record found to the contrary (R. 46-47).[18] In holding

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[18] With respect to the type of service generally provided by U.S.A.C. under its common carrier certificate, and with particular reference to the suitability of that service to the transportation requirements of the supporting shipper the Commission said (R. 46-47):

> "* * * U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon the very

that the service required by the supporting shipper in this case could not be supplied by a common carrier the court below has substituted its judgment for that of the Commission with respect to a material question of fact and has thereby exceeded its role as a reviewing court.

Many common carriers render specialized services. Specialization among common carriers is as old as the industry itself.[19] Such specialization is epitomized by the tank truck carrier, the heavy hauler, and the household goods carrier.[20] Indeed, these carriers were de-

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kind of traffic as is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offers such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the exclusive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service."

[19] See, *Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937) and *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 (1952).

[20] For discussions of common carrier specialization see *Classification* and *Description* cases, supra note 19, and see cases such as *American Red Ball Transit Co., Inc.* v. *McLean Trucking*, 67 M.C.C. 305 (1956); *St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling*, 53 M.C.C. 277 (1951); *W. J. Dillner Transport Co.—Investigation of Operations*, 79 M.C.C. 335 (1959); and *The Western Express Company Extension—Sealdtanks*, —— M.C.C. ——, March 22, 1961 (Docket No. MC-8902, Sub 12).

veloped because of a need for specialized common carrier services, services which would meet the "distinct" needs of certain classes of shippers. There are specialized common carriers which are oilfield carriers,[21] auto carriers,[22] transporters of radioactive material,[23] and as here, carriers specializing in the field of transporting airplanes and/or parts and components thereof. The Commission itself in its decision in this case discussed at some length the subject of specialization by common carriers and made it plain that the mere need on the part of a shipper for a specialized service does not preclude the rendition of that service by a common carrier (R. 35-37).

The record contains no facts whatever which dispute U.S.A.C.'s qualifications in the field. The record shows affirmatively that U.S.A.C. is specialized in the field; that it handles traffic of the same type as that here involved; that it supplies specially adapted vehicles for such purposes; and that it is ready, willing and able to make such modifications as may be necessary to adapt trailers to the particular articles shipped by Boeing. The court below appears to have been of the view that a specialized service is, without more, a contract carrier service and that where specialization is present common carriers are either legally or physically disqualified. This assumption has no grounds for support and is demonstrably contrary to both fact and law.

Within the regulatory framework of the Interstate Commerce Act the Commission concluded that the services of U.S.A.C. were available and had not been shown to be inadequate to meet the reasonable transportation needs

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[21] *Mercer Extension—Oilfield Commodities*, 74 M.C.C. 459. (1946)

[22] *Dealers Transit, Inc., Interpretation of Certificate*, 76 M.C.C. 12 (1955).

[23] *Continental Tennessee Lines, Inc.* v. *Ligon*, 78 M.C.C. 319 (1958).

of the supporting shipper. Substantial evidence of record supports these findings and, accordingly, the district court erred in substituting its judgment for that of the Commission.

The district court also appears to have adopted the view (R. 175-176) that the Commission may not deny a contract carrier application simply because the applicant has failed to meet one or more of the specific criteria. Here again, the court substituted its judgment for that of the Commission on a matter committed to agency discretion. While § 209(b), as amended, specifies certain criteria which the Commission must consider in determining consistency with the public interest and the National Transportation Policy, the section does not purport to direct the Commission as to the weight to be given any or all of the specified criteria. Thereby, it is the province of the Commission to exercise its expert judgment in weighing all material factors. Clearly, any *one* defect in an applicant's proposal, if of sufficient magnitude in the judgment of the Commission, may render the proposal inconsistent with the public interest and the National Transportation Policy.

VIII

CONCLUSION

These appellants respectfully pray this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

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DATED: September 1, 1961

APPENDIX

Text of Statute Involved

Prior to August 22, 1957	Subsequent to August 22, 1957
Former § 203(a)(15)	***Amended § 203(a)(15)***
"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."	"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."
Former § 209(b)	***Amended § 209(b)***
"Application for permit; form and contents; issuance of permit; terms and condition.—Applications for such permits shall be made to the commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission may, by regulations, require. Subject to section 210, a permit shall be issued	"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations

Former § 209(b)

to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. The commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under section 204 (a)(2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities,

Amended § 209(b)

covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, con-

Former § 209(b)

within the scope of the permit, as the development of the business and the demands of the public may require."

Amended § 209(b)

sistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."

National Transportation Policy [*unchanged*],
49 U.S.C. preceding § 1

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 17 and 18

INTERSTATE COMMERCE COMMISSION,
U.S.A.C. TRANSPORT, INC.,

COMMON CARRIER CONFERENCE—IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

AND

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J-T TRANSPORT COMPANY, INC., ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Missouri—Western Division

BRIEF ON BEHALF OF J-T TRANSPORT COMPANY, INC.

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Appellees

On Appeal from the United States District Court for the Western District of Missouri—Western Division

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BRIEF ON BEHALF OF J-T TRANSPORT COMPANY, INC.

OPINIONS BELOW

The opinion of the District Court (R. 160) is reported in *J-T Transport Co.* v. *United States,* 185 F. Supp. 838 (1960). The recommended report and order of the Examiner of the Interstate Commerce Commis-

sion appears at page 15 of the record; the decision of Division 1 of the Commission and that of the entire Commission appear at 74 M.C.C. 324 (1958) and 79 M.C.C. 695 (1959), respectively (R. 22, 29). By a previous pro forma order, the Commission had entered a final order approving the order of Division 1, *supra.* (R. 28)

The reason for two opinions and orders of the Commission in the same proceeding appears of record. Upon the entry of the order of the Commission on July 25, 1958, (R. 28), J-T had exhausted its administrative remedies. Whereupon, on August 18, 1958, J-T filed Civil Action No. 12010 in the United States District Court for the Western District of Missouri, challenging validity of the orders of the Commission, dated January 31, 1958, (R. 22) and July 25, 1958, (R. 28), upon the grounds that same were unreasonable, arbitrary, capricious, unlawful, an abuse of discretion, in excess of statutory authority and short of statutory right for the various reasons assigned in the complaint. The cause was styled *J-T Transport Company, Inc., plaintiff,* vs. *United States of America and Interstate Commerce Commission, defendants.* (R. 8).

Subsequently, and before the filing of answer on behalf of either the United States of America or the Interstate Commerce Commission, Division 1 handed down a report in another proceeding which appeared, upon the face thereof, to be diametrically opposed, in material respects to the report of January 31, 1958. Whereupon, J-T tendered to the Interstate Commerce Commission another petition for reconsideration which the Commission accepted for filing, vacating its previous order of July 25, 1958, and reopening the proceeding for consideration on the present record. The Com-

mission, having reopened the proceeding for further administrative action, by agreement of the parties an order was entered in Cause No. 12010, permitting plaintiff to take a voluntary non-suit without prejudice. (R. 8, 9).

The foregoing charges were made in the complaint filed in the court below in this action, and it was further charged in the complaint below that the matter was held under advisement by the Commission until June 15, 1959, at which time the report and order (R. 29) was handed down. It was charged that it was obvious therefrom that the last report and order, on the same record, constituted nothing more nor less than an extended argument in support of an effort to bolster the report and order of January 31, 1958. (R. 9).

In their answer below, the defendants do not deny the allegations with respect to the previous action filed by J-T, but they do deny the implications contained in that portion of the complaint referred to above. (R. 55).

STATUTES INVOLVED

These appeals involve validity and legality of the action of the Interstate Commerce Commission in construing and applying the August 22, 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), 71 Stat. 411, as well as the National Transportation Policy as enunciated by Congress (54 Stat. 899, 49 U.S.C. note preceding Sections 1, 301, 901 and 1001), in denying an application for a contract motor carrier permit.

QUESTIONS PRESENTED

1. Whether the Commission may, by administrative action, do by indirection that which Congress has expressly declined to permit it to do by direction, in denying an application for a contract motor carrier permit.

2. Whether the Commission has properly interpreted and applied the five tests enumerated in Section 209(b) of the Act.

3. Whether the Commission may refuse a contract motor carrier permit by the imposition of a sixth test not contained in the Act, in determining whether granting of the application would be consistent with the public interest.

4. Whether the Commission may legally deny an application for a contract carrier permit upon the basis of presumptions and conclusions, unsupported by findings of fact predicated upon substantial evidence.

5. Whether, in the light of the National Transportation Policy, the Commission may legally construe the Act as to be designed for the benefit of motor common carriers, and apply same in such manner as to militate against contract carriage and destroy the advantages inherent in the latter mode of transportation.

6. Whether the Commission, in denying an application for a contract carrier permit, may ignore the tests prescribed by Congress, and apply tests of its own creation.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of a three-judge district court, setting aside an order of the Interstate Commerce Commission, entered on June 15, 1959, denying an application of J-T Transport Company, Inc., for a contract motor carrier permit.[1] The Interstate Commerce Commission and the United States of America were defendants in the court below (R. 1), but it is to be noted that no appeal was perfected by the United States.

On March 14, 1957, J-T Transport Company, Inc., hereinafter referred to as J-T, filed with the Commission an application for a permit to operate, as a contract carrier by motor vehicle, over irregular routes of uncrated landing gear bulkheads, requiring special handling and equipment because of their fragile nature, from Indianapolis, Indiana, to Wichita, Kansas. Such application was assigned Docket No. MC-11185, Sub. 102. (R. 15).

J-T for a number of years has been engaged, pursuant to authority of the Commission, in the transportation, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, between a number of points in the west and midwest, and in so doing has conducted a substantial operation. (Page 3, Commission's main brief).

On April 9, 1957, (R. 65) upon application of J-T, and with the support of Boeing Airplane Company, the Commission, after full investigation and a finding that

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[1] The orders of the Commission involved herein also deal with another application designated as Docket No. MC-11185, Sub. 100, (R. 22 and 29). This case involves only Sub. 102.

there was an immediate and urgent need for the service proposed by plaintiff and that there was no carrier service capable of meeting such need, pursuant to authority vested in it by Section 210(a) of the Act, granted to J-T temporary authority to perform the transportation for which permanent authority was sought, and from such time J-T has been and is engaged in performance of the transportation covered by the application.

The application was heard by an examiner of the Commission on May 22, 1957, (R. 15), at which time affected railroads, a number of motor common carriers designated as "heavy haulers", and one motor common carrier, U.S.A.C. Transport, Inc., an appellant herein, intervened in opposition. U.S.A.C. Transport, Inc., hereinafter referred to as U.S.A.C., is the only carrier of any type which persisted in its opposition to the application, U.S.A.C. being a motor common carrier holding authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character. Under such authority, U.S.A.C. could, within the scope of operations permitted by common carriers and as a common carrier, perform the transportation sought to be performed by J-T as a contract carrier, but U.S.A.C. has never participated in performing the involved transportation. (R. 15).

On July 18, 1957, the examiner filed his recommended report and order wherein he found that the proposed operation by J-T would be consistent with the public interest and the National Transportation Policy, and that a permit authorizing such operation should be granted. (R. 15)

Exceptions being filed, on January 31, 1958, Division 1 of the Commission handed down a report and order, published in 74 M.C.C. 324 (R. 22), the effect of which was to deny the application to perform the involved transportation as a contract carrier solely because one common carrier held authority to perform the transportation as a common carrier, and had expressed a willingness so to do. Petitions for reconsideration filed by J-T and various nitervenors were overruled by the Commission on July 25, 1958, (R. 28).[2]

Subsequently, the entire Commission reconsidered the matter on the existing record and, by a split decision, handed down a report and order on June 15, 1959, again denying the application (R. 29), such report being published in 79 M.C.C. 695. Therefrom, it will be observed, as did the court below, that the report and order of June 15, 1959, is that of only four of the eleven members of the Interstate Commerce Commission.

THE FACTS OF THE CASE

Division 1 of the Commission found that the statement of facts contained in the examiner's report to be accurate in all material respects (R. 24), and the entire Commission found the material facts not to be in dispute (R. 31).

The facts as reflected by the record are that at the time of the hearing, J-T was operating thirty-three tractors and forty-five trailers. The trailer which it

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[2] Aircraft Industries Association of America, Inc., and Contract Carrier Conference of American Trucking Associations, Inc., were permitted to intervene in support of the application (R. 28). Common Carrier Conference—Irregular Route, and Regular Common Carrier Conference of America Trucking Associations, Inc., intervened as defendants in the court below.

was using from Indianapolis to Wichita, under its temporary authority and which it will use in the proposed operation, was specially constructed. It is thirty-five feet long, twelve feet six inches high and eight feet wide. It has an underslung frame and an electric elevator is built in the trailer which operates with cables to raise and elevate the floor from the underslung part of the trailer up even to the rear wheels so that an airplane part can be rolled in or out. The roof also raises up and down with the elevator. Special floor racks move with the trailer for the loading and unloading of airplane parts. J-T maintains a terminal at Wichita. (R. 17).

Boeing Airplane Company supported the application. As pertinent herein, it operates a plant at Wichita for the production of airplanes. It has been using J-T's service to transport landing gear bulkheads from Indianapolis to Wichita to the extent of about four loads a month. This for four months under temporary authority. A load consists of four landing gear bulkheads, each weighing about 1380 pounds. The bulkheads are made of aluminum, titanium and magnesium and extreme care must be used for their transportation. Each one is worth about $24,000.00. J-T's equipment, as above-described, was made for and is dedicated to the exclusive use of this shipper for the operation involved in the application and such equipment is necessary to adequately handle the shipper's transportation requirements from Indianapolis to Wichita. J-T now serves the shipper and works closely with it on its transportation problems, and since it has a terminal at Wichita, its equipment can be furnished on short notice. The bulkheads must move in an expedited service as they must be at the plant when they have to

be installed at a certain specified time in a specified airplane. Prior to the use of J-T's service, rail service was used but the cost of constructing, transporting and returning special containers made this service prohibitive. (R. 18).

The examiner summarizes, as follows (R. 19):

> "Summarizing briefly, one shipper supports the application. As concerned herein, it now is using applicant's service under temporary authority from Indianapolis to Wichita. Applicant has constructed a special unit of equipment as hereinbefore described to handle the shippers' traffic as herein involved and such equipment is dedicated to the exclusive use of the supporting shipper. Applicant's terminal at Wichita is located near the shipper's plant and its special equipment can be obtained on one hour's notice. In the circumstances, the examiner is of the opinion that a need has been shown for the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent."

With respect to U.S.A.C., the Examiner found (R. 19):

> "It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein. It claims that if its equipment is not suitable for the transportation requirements of the shipper herein, it will construct any type of equipment that is needed."

The traffic manager for Boeing testified that he had previously used the service of U.S.A.C., in 1953, and after giving one instance of unsatisfactory experience

was cut off from further testimony in that regard by the examiner (R. 101).

With respect to the relationship between J-T and Boeing and the latter's need for a contract carrier service, the witness said (R. 91):

> "Well, we feel they are just merely a part of our production line in that we can schedule the parts right from our manufacturer, and the shipments are moved right into our receiving area and through the inspection and right on into our production, so they are actually just an extension of our production line. . . . We feel we definitely need this type of service to furnish or build the best type of aircraft that we can for the United States Air Force."

The appellant U.S.A.C. is a motor common carrier operating over irregular routes, transporting aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between points in the United States east of the Mississippi River, on the one hand, and on the other, points west of the Mississippi River. It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein, but none from and to points involved in this application. (R. 19).

The only evidence adduced on behalf of U.S.A.C. was the testimony of Mr. Martin A. Decker and exhibits filed by him, appearing in pages 110, et seq., of the record. The evidence on behalf of U.S.A.C. is more significant by virtue of what it omits than by what it supplies.

The witness says U.S.A.C. has a terminal at Indianapolis, but none at Wichita; equipment is stationed at Indianapolis, and equipment moves through Indianapolis; he says that a majority of the equipment moving through Indianapolis is deadheading (R. 116), but that is because of traffic handled from Tinker Field, Oklahoma, (R. 117), and this equipment consists of all types of units, not those which could be used in performance of the involved transportation (R. 120).

The witness says that if the traffic were tendered to U.S.A.C. it would modify equipment to meet the shipper's requirements (R. 112, 118), but nowhere does he say that U.S.A.C. would dedicate this equipment to the exclusive use of the shipper. All he says in that connection is:

> "Q. If the instant traffic were tendered to you, would you be willing to station a closed-top van trailer at Indianapolis?
>
> A. We would." (R. 118)

The witness admits that in U.S.A.C.'s tariff, Supplement No. 1 in F.I.C.C. No. 30, Rule 40 therein provides:

> "The determination of equipment to be used to transport any shipment efficiently and safely shall rest exclusively with the carrier."

It does not appear from the evidence adduced on behalf of U.S.A.C. that it would assign any motor vehicle for a continuing period of time to the exclusive use of the shipper here involved, or that it has ever assigned a motor vehicle to the exclusive use of any shipper; it does not appear that it will provide a transportation service designed to meet the distinct need of

the shipper supporting this application. It does not appear, contra to the statement in appellant's brief, that U.S.A.C. was operating with idle equipment; it does not appear that U.S.A.C. has participated in handling involved traffic, or that it has any prospect of so doing; *and, finally, there is not one iota of evidence that granting of the instant application will have any effect upon the services of U.S.A.C. Transports, Inc.*

LEGISLATIVE HISTORY OF PERTINENT SECTIONS OF THE ACT

One of the most impelling reasons why the orders of the Commission should be set aside and the judgment of the court below affirmed is found in the legislative history of pertinent sections of the Act. Our position on this point is that by its orders here attacked, the Commission has done indirectly that which it sought authority from the Congress to do directly, and was there rebuffed.

From the date of enactment of Part II of the Interstate Commerce Act, commonly known as the Motor Carrier Act, on August 9, 1935, (49 U.S.C. 301 et seq.), the Commission has so construed and applied the Act as to permit it to impose more and more regulations and restrictions upon contract carriage for the benefit of common carriage. It has not construed the Act as legislation designed to regulate all modes of motor transportation, but has treated it as being aimed at regulation of contract carriage. Examination of the Act itself, will, however, suffice to establish that thereby the Congress intended that all modes of motor carriage be regulated. This court, in *American Trucking Associations* v. *United States,* 344 U.S. 298, 312-313, in speaking of the conditions which caused enactment of the Act, said:

> "So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the 'grandfather' clause."

As early as 1937, however, the Commission, in a divided opinion, adopted the position that the purpose of the Act was to protect common carriage at the expense of contract carriage. In ex parte No. MC-12, *Contracts of Contract Carriers,* 1 M.C.C. 628, 629, it was said:

> "This principle is inherent in the motor carrier Act, 1935. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. For that reason, it differs from the common-carrier regulation."

Historically, since enactment of the Act, as will be demonstrated hereinafter and is demonstrated in the brief filed on behalf of appellee Contract Carrier Conference of American Trucking Associations, Inc., the Commission, by appeals to Congress and by the promulgation of rules and regulations and the handing down of administrative edicts has consistently sought to limit and restrict the operations of contract motor carriers to the benefit of motor common carriers. It has long been the opinion of the contract carrier industry, as well as of responsible representatives of the government, that the Commission had overreached itself and was exercising authority finding no basis in law with respect to many of its restrictive reports dealing with the contract carrier industry. The statement by the

Commission appellant in brief that the Commission has consistently applied the so-called "willingness and ability test" in passing on contract carrier applications is contra to the published reports of the Commission, from which it will be shown that numerous tests have been tried and abandoned in the effort to regulate contract carriage.

On of these theories was the theory that the Commission could lawfully restrict the number of contracts which a contract carrier might hold, which theory was stricken down by this Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409. There, as here, the Commission sought to justify its position upon the basis of exercise of its discretion in determining what would be consistent with the public interest. There, however, the Commission's position was stronger than we here find it, in that there it had not made specific application to Congress for such power and been rebuffed.

As enacted, and as continued until the amendments of 1957, the term "contract carrier by motor vehicle" was defined by Section 203(a)(15) as follows:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph 14 of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Section 209(b), as originally enacted, provided that permits for contract carrier applications, the applicant meeting other prescribed conditions, should be issued if it appeared that the proposed operation "will be

consistent with the public interest"; upon enactment of the National Transportation Policy in 1940, Title 49 U.S.C., (Note preceding 301), the foregoing was changed to read: "will be consistent with the public interest and the National Transportation Policy declared in the Interstate Commerce Act".

It is to be noted that to qualify for a permit as a contract carrier, insofar as the sections here pertinent are concerned, it was required *only* that the carrier operate under individual contracts or agreements, that such transportation be consistent with the public interest, and that contract carriage was specifically recognized to be entitled to the benefits of the National Transportation Policy.

As distinguished from the limited requirement that the operation be consistent with the public interest insofar as contract carriage is concerned, insofar as common carriage was concerned the Congress provided that a certificate to operate as a common carrier could not be issued unless it was established that the public or future convenience and necessity required such operation. (49 U.S.C. 307).

This Court has said that the legislative history of an Act is of importance in determining the scope of authority of an administrative agency. In this connection see *Harrison* v. *Northern Trust Co.*, 317 U.S. 476; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54; *U. S.* v. *C. I. T. Credit Corp.*, 344 U.S. 218; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. And it has said, as well, insofar as the Commission is concerned, that it will not sanction improvisation and permit the Commission to do indirectly that which Congress has not seen fit to allow it to accomplish directly. See *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 475.

In its order of June 15, 1959 (R. 29), as well as in brief, the Commission takes the position that it has authority to deny a contract carrier permit solely because a common carrier avers its willingness and ability to perform the specialized transportation for which a need has been demonstrated. It is the position of the Commission in brief, as we understand it, that it possessed and exercised such authority both before and subsequent to the amendments of 1957. We present, however, that it would be most unreasonable to assume that an administrative body of the stature of the Commission would apply to Congress for specific authority to deny contract carrier permits upon such ground if the Commission was of the bona fide opinion that it possessed general authority so to do under the Act. That, however, is precisely what the Commission has done in the case at bar.

It is obvious that as early as 1955 the Commission, itself, doubted its authority in this respect, and opinion within the Commission had formalized itself to the extent that in its 69th Annual Report to the Congress (1955) under "Legislative Recommendations", at page 131 of the Report it is said:

> "19. We recommend that Section 203. (b) (49 U.S.C.A. 309 (b)) be amended so as (1) to empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier by motor vehicle may lawfully perform transportation services, and (2) *to provide that motor contract carrier permits may be issued only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.*" (Emphasis supplied.)

In discussing the second recommendation, *supra*, the Commission said:

> "The further recommendation to permit the issuance of motor contract carrier authorities *only* upon a showing that existing common carriers are unwilling or unable to provide the required type of service, *would give the Commission a further measure of control over the expansion of contract carriage and*, at the same time, would serve to protect shippers whose peculiar needs cannot adequately be met by common carrier. It would have the added advantage of allowing denial of a contract carrier application where no service other than dedication of equipment is needed by the shipper or proposed by the applicant, if, in the circumstances, a common carrier could and would dedicate equipment (Emphasis supplied)."

The foregoing, in our opinion, is formal admission on the part of the Commission in 1955 that it had no authority in law to deny an application for a contract carrier permit solely because a common carrier expressed a willingness and ability to perform the involved transportation. The position assumed by the Commission in the case at bar is directly contra to its legislative recommendation of 1955.

The Congress did not see fit to follow the legislative recommendation of the Commission in 1955 and no bill to invest the Commission with the requested authority was introduced.

In 1956, the Supreme Court handed down its opinion in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, and therefrom it was apparent that the Commission should be authorized to limit the number of contracts which a contract carrier might hold in order to preserve the distinction between the two modes of

transportation, i.e., common and contract carriage, as required by the National Transportation Policy as enunciated by Congress. See Historical Note preceding 49 U.S.C.A., Section 301, wherein the Congress, in 1940, said:

> "National Transportation Policy: It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of *all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each*; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis supplied.)

After the decision in the *Contract Steel Carriers* case, *supra,* the Commission was reasonably sure that the Congress would be receptive to an amendment to the Act restricting the number of contracts which a contract carrier might hold, and it took advantage of the opportunity to try to "go through the back door," so to speak, and tack on an amendment which would have given it authority to do that which it has done by administrative edict in this case.

In its 70th Annual Report (1956) to the Congress under "Legislative Recommendation" at page 162, the Commission said:

> "6 (a) We recommend (1) that the definition of contract carrier by motor vehicle as set forth in section 203 (a) (15) (49 U.S.C.A. 303 (a) (15)), be amended so as to state clearly the nature of the service which may be performed by such carriers

and to provide that such services may be performed under continuing contracts for only one person or a limited number of persons, and (2) if so amended, that section 212 be amended by adding a new paragraph (c) authorizing the Commission to revoke the permit of such a carrier and to issue in lieu thereof a certificate of public convenience and necessity if it finds, after a hearing, that the operations of the permit holder are not those of a contract carrier under the revised definition, are those of a common carrier, and are otherwise lawful.

(b) We also recommend that section 209 (b) be amended so as (1) to empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier by motor vehicle may lawfully perform transportation services without additional authority and (2) *to provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.*" (Emphasis added).

In connection with the second recommendation under (b), *supra*, the Commission said:

"The further recommendation to permit the issuance of motor contract carrier authorities *only upon a showing that existing common carriers are unwilling or unable to provide the required type of service would provide a further measure of control* over the unlimited expansion of contracts for non-specialized service. It would also serve to protect the shippers whose peculiar needs cannot adequately be met by a common carrier."

It is interesting to note that the dedication of equipment feature, contained in the Sixth Report, is omitted

in the 70th Report, but it is also interesting to note that the Commission in 1956 still was of the opinion that it needed legislative authority to permit it to issue contract carrier permits only upon a showing that existing common carriers are unwilling or unable to provide the required service.

The legislation to which we now allude resulted from the foregoing recommendation in the Commission's 70th Annual Report.

In the 1st Session of the 85th Congress the Commission procured the introduction of identical bills in the House and Senate, being H. R. 5123 and S. 1384. The Senate Bill, as amended, subsequently was enacted. The House Bill was superseded by H. R. 8825, which was identical with S. 1384, as amended. We shall, therefore, refer only to S. 1384, inasmuch as the public hearings were conducted in connection therewith before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate. The distinction between S. 1384, *as introduced and sponsored by the Commission*, and S. 1384 *as enacted into law by the Congress* is of paramount significance.

For convenience we here reproduce pertinent portions S. 1384 as introduced under the sponsorship of the Commission, with emphasis added.

(S. 1384, 85th Cong., 1st Sess.)

A Bill To revise the definition of contract carrier by motor vehicle as set forth in section 203(a)(15) of the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

(1) By changing paragraph (15) of section 203 (a) thereof (49 U. S. C., Section 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services *of a special and individual nature required by the customer and not provided by common carriers.*";

"Sec. 2. Part II of such Act is further amended by inserting between the words 'thereunder,' and 'that' in the second sentence of section 209 (b) (49 U.S.C. 309 (b)), the following: 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown,' and (2) by changing the third sentence thereof to read as follows: 'The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions, and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirement established by the Commission under section 204(a)(2) and (6): Pro-

vided, That within the scope of the permit and any terms, conditions, or limitations, attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require." (Emphasis added.)

It is to be noted that the Commission sought authority to apply both the "specialization" and "willingness and ability" of common carrier tests.

And now, for convenience, we reproduce pertinent portions of S. 1384 as enacted, and which became effective on August 22, 1957. Therefrom it will be noted that the features of the bill as introduced, upon which we placed emphasis, have been omitted and, we respectfully present, the Commission was forced to agree to delete same and concede that it could not obtain legislative sanction for the authority which it here exercises by administrative edict by the very certain threat of being unable to obtain passage of any legislation with these features remaining therein.

Public Law 85-163.
85th Congress, S. 1384.
August 22, 1957.

AN ACT.

71 Stat. 411.

To revise the definition of contract carrier by motor vehicle as set forth in section 203(a)(15) of the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

"(1) By changing paragraph (15) of section 203 (a) thereof (49 U.S.C. 303(a)(15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) *for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*" (Emphasis added.)

"Sec. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209(b) (49 U.S.C. 309(b)) a new sentence to read as follows: 'In determining whether issuance of a permit *will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements;*" (Emphasis added.)

The brief and argument of the Commission would lead the Court to believe that the Commission of its own volition deleted the objectionable features of S. 1384 as introduced. Such position does violence to the record.

Hearings on S. 1384 were conducted before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate, 1st Session,

85th Congress, on April 17, May 7, 8 and 9, 1957, Senator George A. Smathers being chairman of the Subcommittee. The printed transcript is entitled "Surface Transportation—Scope of Authority of I.C.C.". Hereinafter we will refer thereto as Hearings, with appropriate page reference. In the course of the hearings tremendous opposition developed to S. 1384, primarily by virtue of the portions thereof which were eventually deleted, and the bill, as enacted, was the result of a compromise between representatives of the contract carrier industry and the common carrier industry, with the understanding that the contract carrier industry had no opposition to the proposed legislation so long as the existence of common carrier service might not be used by the Commission as the basis for denial of a contract carrier permit, other prerequisites being met.

In limine, at pages 10 and 11 of Hearings, appears a letter from Mr. William P. Rogers, then Deputy Attorney General, writing on behalf of the Department of Justice to Honorable Warren G. Magnuson, Chairman, Committee on Interstate and Foreign Commerce, with reference to S. 1384 as introduced in which, insofar as here pertinent, the Department of Justice opposed the bill in part and said:

> "The bill would amend section 203(a)(15) of the Act by changing the definition of 'contract carrier' to mean any person who engages in transportation by motor vehicle of passengers or property in interstate commerce for compensation (with the exception of common carriers by motor vehicle and those engaged in motor vehicle transportation for hire as an express company) 'under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a *special and individual nature*

required by the customer and not provided by common carriers." (Emphasis added.)

"We are opposed to enactment of that part of the definition, which reads '*and not provided by common carriers.*' This quoted limitation is rather vague and it could lead to the contention by common carriers that they provide contract carrier services. Such an interpretation might unduly limit the number and availability of contract carriers. Many contract carriers are small business men who would not be able to compete on a common carrier basis.

"The bill would also amend section 209(b) of the Act, which sets forth the procedure and criteria to be observed in granting contract carrier permits, by adding a new criterion to the effect that the Commission must find '*that existing common carriers' are unwilling or unable to provide the type of service for which a need has been shown.*" Emphasis added.)

"The Department considers this proposed amendment unduly restrictive of the ability of applicants (particularly small business men) to enter the contract carriage field, and is therefore opposed to its enactment.

"The Bureau of the Budget has advised that there is no objection to the submission of this report."

The testimony of Honorable Owen Clarke, Chairman, Interstate Commerce Commission, in support of S. 1384, appears at pages 21 et seq. of Hearings, and we are reasonably sure that when Chairman Clarke testified he knew the attitude of the Department of Justice as reflected by the letter, *supra*, and he knew, as well, that the Department of Commerce was unalterably opposed to both of the objectionable features of the bill. And, of course, he was well aware of the very

considerable opposition from shippers needing and using contract motor carrier service and the contract motor carrier industry at large.

With these facts at hand Chairman Clarke magnanimously (sic) agreed (Hearings page 22) to remove from the proposed amendment to section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," but, and here the joker, he said nothing about striking the proposed amendment to section 203(a) "*and not provided by common carriers.*", nor the "special" feature of the proposed amendment to section 203(a)(15).

Throughout the testimony of Chairman Clarke he sought enactment of the legislation with the above features remaining therein, the practical effect of which would have been to give the Commission authority to do that which it has here done without authority, and say that a carrier could not perform a service as a contract carrier if a common carrier offered to provide such a service.

The Congress refused to grant the Commission the authority it sought, deleted "and not provided by common carriers," substituted "transportation services designed to meet the distinct need of each individual customer" for the proposed "special and individual nature," and thereby definitely established that the existence of common carrier service was not to preclude issuance of contract carrier permits, other prerequisites being met. That, however, is exactly what the Commission has here done.

We shall now endeavor to demonstrate from the legislative history of S. 1384 that removal of these objec-

tionable features was not due to magnanimity on the part of the Commission, and that S. 1384 became law only by virtue of the fact that the Congress did not propose to authorize the Commission to deny an application for a contract carrier permit upon the basis of a common carrier averring its willingness and ability to perform the needed transportation, all other prerequisites being met.

We will not burden the Court with extensive quotations from the evidence adduced at the Hearings, but do say, without fear of successful contradiction, that S. 1384 with "and not provided by common carriers" remaining therein received the enthusiastic support of the Commission, of common carriers and the various Associations representing them. The Senators, however, were dubious of this "joker," and the Department of Commerce, joining forces with the Department of Justice, as well as shippers, contract motor carriers, and Associations representing contract motor carriers, vigorously opposed same upon the ground that the Commission would interpret it as authority to deny a contract carrier permit upon the ground that a common carrier averred a willingness to perform the same service.

Hon. Louis S. Rothschild, Undersecretary for Transportation, Department of Commerce, testified before the Subcommittee on May 8, 1957; his testimony appears at pages 197 et seq., of the Hearings. The Senators, in the course of his testimony, evinced an early interest as to his views with respect to the "joker". Before Mr. Rothschild could get to the point Senator Schoeppel, at page 200, said:

> "I would like to ask a question right there: Supposing you had a common carrier serving certain

territory but wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonable adequate and prompt service?"

To the foregoing question Mr. Rothschild, at page 201, responded:

"Well, later in my statement, Senator Schoeppel, we say that we don't quite believe that the rule should be as stringent as proposed by the ICC and that it should not be necessary to make all of these showings in order for a person to get a contract carrier."

On the same page, speaking with reference to the contract carrier industry, Mr. Rothschild said:

"Contract carriers by motor vehicle developed prior to enactment of the Motor Carrier Act in response to the needs of certain shippers who could not or preferred not to provide their own transportation, yet required a more specialized and individual service than was available from common carrier.

"A contract carrier would enter into a special agreement with a single shipper, usually on a long-term or individual basis, under which the carrier would provide a service which was closely integrated to the particular needs of the shipper. It was the kind of service which the shipper himself might have provided had he so elected, and it constituted in essence a virtual dedication of the carrier to the needs of a single shipper, or in some cases, a group of closely related shippers.

"The Congress, in enacting legislation to regulate the motor transportation industry, recognized this

development and provided for a different degree of regulation applicable to contract carriers than it provided for common carriers."

Senator Smathers, Chairman of the Subcommittee, and Mr. Rothschild, clearly express the Congressional intent in deleting "and not provided by common carriers", at pages 202 and 203 of the Hearings, as follows:

Mr. Rothschild, among other things not here pertinent, made this statement at page 202:

"Commissioner Clarke, in testifying on S. 1384 yesterday withdrew the Commission's request for authority to deny application for contract authority unless it is shown that existing common carriers are unwilling or unable to provide the required type of service."

He was interrupted by an immaterial question, and then Mr. Rothschild continued in response to a question from Senator Smathers, as follows:

"We would not object to that change. However, the Department does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of a contract carrier by motor vehicle as one of the distinguishing characteristics of a contract carrier. Perhaps I should explain that a little more, Mr. Chairman." (Emphasis added.)

"Senator Smathers: We would appreciate it.

"Mr. Rothschild: As we read the proposal of the Interstate Commerce Commission, and then the amended position which they took in Commissioner Clarke's statement yesterday, *we believe that what they are currently proposing is that in the definition of a contract carrier by motor vehicle, the existence or non-existence of common carrier motor*

service should be included, but when it comes to their own procedures as to how they operate under this, they retain for themselves the right to cast that qualification out. We think, in order to be consistent, it ought to be out both places. (Emphasis supplied.)

"Senator Smathers: In other words, as the Senator from Kansas brought out, whether or not there is the availability of a common service should not be a point in consideration?

"Mr. Rothschild: They should not be able to deny the application of a common (sic) (contract) carrier simply because someone claims that there is common carrier service there.

"Senator Smathers: Thank you.

"Mr. Rothschild: Does that answer your question, Senator Schoeppel?

"Senator Schoeppel: Yes."

The Department of Commerce had introduced a bill of its own designed to redefine "contract carrier", and in connection therewith a comparison was being made by the Senators with the ICC sponsored bill. At page 204 of the Hearings, and during the course of Mr. Rothschild's testimony, Senator Smathers said:

"So then you people made a proposal and the ICC has made a proposal. Now let's look at the ICC proposal for just a minute to see how they propose to redefine what we mean by contract carriers. I am going to read. (Senator Smathers then reads the proposed definition of contract carrier contained in the proposed amendment to S. 1384, including 'and not provided by common carrier'. And then the Senator goes on): Now as I gather it, your particular recommendation is that

there be no limit as to the number of persons with whom they do business?"

And then the following colloquy took place:

"Mr. Rothschild: No sir; We think the Commission should have the right to take into consideration the number of contracts that a contract carrier would have, *but we do not believe that this definition which is contained in line 4, 5 and 6 should apply at that point any more than the Commission says it should not apply in Section 2 of the same proposal.*

"Senator Smathers: In other words, then, you would be satisfied with the language on line 3, page 2, 'under continuing contracts with one person or a limited number of persons'?

"Mr. Rothschild: For the furnishing of transportation services.

"Senator Smathers: For the furnishing of transportation services of a special, etc. But; I want to get just this language here that you are satisfied with.

"Mr. Rothschild: We would stop that definition with the word 'customer' in line 6."

Line 6 in the format of the Bill was simply "customer not provided by common carriers", and as Mr. Rothschild told Senator Smathers, the Department of Commerce would put a period after "customers" and delete "not provided by common carriers".

And then further, in discussion the proposal of Chairman Clarke to omit "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and leaving in "and not provided by common carriers", the fol-

lowing discussion took place between Senator Smathers and Mr. Rothschild at pages 206 and 207 of the Hearing:

"Senator Smathers: . . . Now, we come on down to the next line: 'for the furnishing of transportation services of a special and individual nature required by the customer'. You want to start (stop) right there and 'not provided by common carrier'?

"Mr. Rothschild: We still prefer our own definition, but this would be the same.

"Senator Smathers: Except you leave out 'and not provided by common carriage'.

"Mr. Rothschild: Yes.

"Senator Smathers: We, as a committee, don't like to be caught between two departments of the government, so to speak, the ICC with one bill, and the Department of Commerce with another bill, each one fighting for its own language because we have to resolve it a little bit. This language to be satisfactory to you I gather if we left off that last phrase on line 6 'and not provided by common carrier' is that correct?

"Mr. Rothschild: Yes, sir.

"Senator Smathers: Did I get an answer to that?

"Mr. Rothschild: The answer is yes.

"Senator Smathers: I understand yesterday Chairman Clarke withdrew the Commission's support for this last phrase; Is that correct?

"Mr. Rothschild: In section 2, not in section 1.

"Senator Smathers: Not in section 1, but in section 2. You will find it on page 10 of his statement. What did he have reference to in this bill where he said he wanted to withdraw it?

"Mr. Rothschild: May I read a paragraph from his statement of yesterday?

"Senator Smathers: Yes, so we can clear on it.

"Mr. Rothschild: Commissioner Clarke said that: as drafted, S. 1348 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Commission upon further consideration voted to withdraw its recommendation to amend section 209. We therefore recommend that lines 9 through 15 on page 3 be amended to read:'

"(Mr. Rothschild continues): So that would eliminate the words that existing common carriers are unwilling or unable to provide the service for which a need has been shown.

"Senator Smathers: He would eliminate that on lines 12, 13, and 14; Is that correct?

"Mr. Rothschild: That is correct.

"Senator Smathers: Is it your understanding, Mr. Barton—how does he feel about it on line 6, do you know?

"Mr. Barton: (Commission counsel): I understand he wanted to withdraw that requirement altogether.

"Mr. Rothschild: Our interpretation may not be correct, but we think he wanted it in the definition but not in section 2. *We think it should come out in both places.*" (Emphasis supplied.)

As a definite indication that the Senators were interpreting the proposal to strike "and not provided by common carriers" as assurance that the Commission

would not have authority to deny a contract carrier permit because common carrier service was alleged to be available, we refer the Court to Hearings, page 214, where the testimony of Mr. H. O. Mathews, General Manager of the Transportation and Distribution Division of Armour & Company appears:

> "Mr. Mathews: As I understand it, Senator, it would permit the common carriers to complain that they are in a position to render that same service, and therefore the Commission would take the contract carrier out of business, or quit.
>
> "Senator Smathers: Well, we have all agreed—you just heard the Department of Commerce here, and you heard probably the Secretary of the ICC yesterday—
>
> "Mr. Mathews: I didn't hear him.
>
> "Senator Smathers: Apparently, they are in agreement that they should strike out the words 'and not provided by common carriers' (Emphasis supplied).
>
> "Mr. Mathews: This, of course, was prepared around that, and I didn't understand what the Secretary was saying.
>
> "Senator Smathers: If we leave out the words 'not provided by common carriage', *even though there may be common carriage in the area, it does not prohibit you from still doing business with a contract carrier.*
>
> "Mr. Mathews: With the suggestion of changes in the wording you were making a while ago, Senator, that might change that, although I haven't had an opportunity to review it. I didn't have the bill in front of me, and this statement was based on the bill as it was worded, and I will not burden you with reading further on that because that

might be ambiguous to the situation as it exists should the bill be changed.

"Senator Smathers: All right.

"Senator Schoeppel: Mr. Chairman, that just points out we have a perplexing problem here to incorporate language in the bill. Our friends from the ICC submitted a bill the way they wanted it. Now there have been some changes suggested. Now you come up with these points, and we have to wrestle with it. Now, some of these explanations here, by way of illustration, furnish us with an opportunity for discussing this matter in executive session and otherwise, to keep this thing on some kind of a, let us say, progressive yet equitably fair legislative basis."

With respect to the proposal of the Commission to delete "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" in section 2 of proposed S. 1384 and leaving "and not provided by common carriers" in section 1 thereof, Mr. Mathews, at page 219 of the Hearings said:

"Based upon Chairman Clarke's prepared statement my opposition to S. 1384 is *intensified rather than eliminated. As I read his testimony, no change is suggested in section 1 of the proposed bill.* The entire change to be in section 2. While the test to be applied to a new contract carrier is possibly modified to some extent by the amendment, it would still be extremely difficult to obtain new contract carriage within the definition of section 1 of the Act." (Emphasis supplied)

To the same effect see the testimony of Hon. Clarence D. Todd, General Counsel for the Contract Carrier Conference of American Trucking Associations, Inc.,

and the colloquy between Mr. Todd, Senators Schoeppel and Lausche, (Hearings 294-5) in which it was developed that leaving "and not provided by common carriers" in the proposed bill would enable the Commission to withhold permits for contract carriers to the same extent as would have been the case had "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" been permitted to remain therein. And, in this same connection, see the colloquy between Senator Lausche and Mr. Howard E. LeFevre, (Hearings 317) a contract carrier serving Ford Motor Company, in which it was developed that to omit "and not provided by a common carrier" would prevent the Commission from denying an application for a contract carrier permit on the ground that a common carrier was willing to provide the service.

In the testimony of Mr. E. G. Rice, President, Complete Auto Transit, Inc., a contract carrier serving General Motors, reference again is made to the proposal of the Commission to strike one portion of the objectionable feature of S. 1384 and leave in "and not provided by common carriers". At page 328 of Hearings, the following appears:

> "Senator Lausche: You are not giving testimony on S. 1769?
>
> "Mr. Rice: No. There is a provision in there that the service will not be provided by common carrier, and that Mr. Clarke did nothing about. However, further on there is the matter of the issuance of a permit and a common carrier being fit, willing, and able. That he agreed to take out. However, I make the point if it is in the first place you never will get to the second. You can't become a carrier under the definition, so it should

come out in both places, and I think Mr. Todd so testified.

"Senator Lausche: I think he testified that S. 1384 would further provide that additional permits may be issued only upon showing that existing common carriers are unwilling or unable to render the required type of service. Now, your opposition to this proposal is that while he agrees to rectify the language in Section 1, part II, he doesn't do so in the definition?

"Mr. Rice: That is right, and you will never reach Part II because you wouldn't be a carrier under the definition.

"Senator Lausche: I see, all right. Thank you very much.

"Mr. Rice: So it should be out in both places. Thank you." (Emphasis added).

We have made the statement heretofore that S. 1384, as enacted, was compromise legislation worked out between the Commission and the representatives of the contract and common carrier industries, with the understanding and agreement that the Commission might be granted authority to *limit contract carriers as to the number of contracts which they might hold and the services which they might perform, but that the Commission would not have authority to deny an application for a contract carrier permit on the ground that a common carrier was willing to perform the proposed transportation service for which a need has been shown.* In support of our statement we respectfully refer the Court to the testimony of Mr. Thomas F. Robertson, Executive Director, Common Carrier Conference—Irregular Route—American Trucking Associations, Inc. Hearings, pp. 345 *et seq.* Mr. Robertson prefaces

his testimony by the statement that the carriers he represents are those which are most competitive with the contract carriers, and then he says:

> "We have studied these bills and we have discussed them with our colleagues up in ATA and in deference to our contract-carrier colleagues the membership of our conference would be most happy to yield on sev ral points in the bill. *We would yield to the removal of the word 'specialized' in the definition which I think is in Part I, where they talk about special and individual nature, and we would also yield to the deletion of the words 'and not provided by common carriers,' in addition to what the Commission has already yielded in Part II of the Act, where the Commission lately made up its mind that it would remove that 'unwilling and unable' that burden of proof that a contract carrier would have.* (Emphasis supplied.)
>
> "We would yield these things to gain the main objectives, sir, and the main objective, to our point of view, is that the Commission have the unequivocal power to limit the number of contracts, and that they also would have a reasonable grandfather clause that would protect the property rights of those contract carriers who would no longer be within the new definition. We think that only fair."

After hearing the testimony of Mr. Robertson on the compromise legislation which had been worked out the Senators took special precautions to see that the Interstate Commerce Commission was represented and had no objection to the compromise, as appears at page 348 of the Hearings, as follows:

> "Senator Lausche: Is there a representative of the Interstate Commerce Commission here today?
>
> "Mr. Hardin: Yes, sir.

"Senator Lausche: You a · hearing what is being said?

"Mr. Hardin: Yes, sir.

"Senator Lausche: All right."

As we view the legislative history of the amendments, and the amendments themselves, it appears that in S. 1384, as enacted, Congress specifically provided that in determining whether issuance of a permit would be consistent with the public interest and the National Transportation Policy, the Commission should apply five tests, therein enumerated, and specifically refused to grant to the Commission authority to apply the tests of whether the proposed service was provided by common carriers, or that common carriers are unwilling or unable to provide such service. The Commission in the opinion of the court below, denied the instant application by the application of such sixth test. Such is also our opinion, based on the report of the Commission (R. 29). This view is supported by at least one of the Commissioners in that Commissioner Webb (R. 50) said:

> "Weighing the five tests prescribed by Section 209(b) of the Act for determining whether a permit should be issued, I agree with the result reached by the majority. *It seems to me, however, that the report prescribes a sixth test not authorized by Congress and, in fact, a test considered by the Congress and deliberately rejected.* The report seems to me to convey the impression that if an applicant for contract carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of Section 209 (b) have been satisfied (Emphasis added).

"What I call the sixth test prescribed by the report is the conclusion that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shippers' reasonable transportation requirements. *The conclusion, in my opinion, is not supported by the language of public 85-163 or by the pertinent legislative history* (Emphasis added).

"When the bill S. 1384 which became public law 85.163 was introduced, it amended Section 203(a)(15) of the Act so as to define a contract carrier as one who conducts its business other than as a common carrier and '. . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*'

"The Senate Committee on Interstate and Foreign Commerce deleted the language emphasized above. In addition, the Committee eliminated from the bill the requirement of a showing under Section 209(b) 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' In place of the language last quoted, the Committee directed the Commission to consider 'the effect which granting the permit would have upon the services of the protesting carriers.' As thus amended, the bill was enacted into law.

"Obviously there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted that language solely because it required an impossible

burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in Section 203(a)(15) that the proposed service must be shown to be 'not provided by *protestant* common carriers' and in Section 209(b) 'that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown.'

"Contract carriers opposed the bill as originally introduced on the ground that the required proof as to the non-existence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public and convenience necessity standard in Section 209 proceedings disappear when, under the new law, permits cease to be unrestricted licenses for hunting traffic. *As I see it the report attempts to write into Section 203(a)(15) and 209(b) language deliberately stricken by the Congress. The report converts compromise legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating defeat for contract carriers.*" (Emphasis in last paragraph supplied.)

Senate report No. 703 of the First Session, 85th Congress, was submitted by Senator Smathers of the Committee on interstate and foreign commerce to accompany S. 1384. In the introduction he states the purpose of the bill, and there is no indication in the statement of purpose of any intent to grant the Commission additional authority to impose the sixth test referred to by Commissioner Webb.

Senator Smathers and the Committee emphasized recognition of the distinction between the two modes of transportation, i.e., contract and common motor car-

riage when, in speaking with reference to the proposed redefinition of contract carriage, the Report on page 2 says:

> "Congress recognized in the definition a difference between common and contract carriers, but, as Commission Chairman Clarke pointed out, the language of the present law is inadequate for proper administration and for observing the distinctions which Congress intended. Under the bill as introduced a contract carrier would be one who conducts its business other than as a common carrier and . . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.*" (Emphasis supplied.)
>
> "Chief among the differences thus proposed are that a contract carrier could have only one contract or a limited number of contracts. Important also *is that the service would be such as is not provided by common carriers.* These changes would constitute a significant tightening of the present law." (Emphasis supplied.)

And, then, in further reporting on S. 1384 as introduced, the Report at page 3 says:

> "A further change would be effected whereby that portion of Section 209(b) (49 U.S.C. 309(b)) relating to the issuance of a contract carrier permit would include a provision that a permit would be issued when it appears, *inter alia,* 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' Presumably this was intended by the drafters to supplement the language in the definition providing that a contract carrier service is such as is 'not provided by common carriers.' "

And, then, as here pertinent, the Report of the Committee on page 3 continues as follows:

> "Undoubtedly the bill as introduced would supply a more positive statutory guide to the Commission than that existing today, and would make readily possible clearer distinctions than now exist as between motor common and contract carriers. *The Committee is of the opinion, however, that, as originally introduced, S. 1384 would be unduly restrictive on contract carriage. Accordingly, the Committee recommends a number of amendments to the bill.*" (Emphasis supplied.)

The Committee then, after observing that S. 1384 as introduced was the first specific attempt by the Commission to procure enactment of legislation on the subject-matter thereof, reported this on page 4:

> "However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 would provide too rigid a pattern. It decided that the proposed requirement in Section 209(b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service should be withdrawn. And it asked for opportunity to make additional comments should the testimony of other parties propose further amendments. As will appear later, further amendments were proposed, and the Commission has given the Committee its views respecting them."

The Committee, in its report, then details the support of S. 1384 by witnesses representing the common carriers, their associations, and the railroads, as well as the opposition to S. 1384 from substantial shippers, contract carriers and associations representing con-

tract carriers. The Committee then said at page 5 of its Report:

> "The Department of Commerce, speaking through the Under Secretary for transportation, noted critically that some contract carriers today furnish a common carrier service and argued that a limitation on the number of contracts that may be held is desirable, as proposed in the bill. *It does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of contract carrier.*" (Emphasis supplied.)

In further discussing the amendments recommended by the Committee which would strike from Section 1 of S. 1384 as introduced the language "and not provided by common carriers," and which would strike from Section 2 thereof the language "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," the Committee said at pages 5 and 6 of its Report:

> "Insofar as language is concerned, there can be no doubt that some of the parties at first entertained rather sharply divergent views as to the wording Congress might wisely and fairly adopt to express its own considered judgment. That all parties or groups affected by the bill are earnestly concerned with the problems giving rise to its introduction is evidenced by the variety and range of interest appearing and testifying, and by the thoughtfulness of their presentation.
>
> "An apparent desire to obtain constructive legislation has motivated the most active parties and groups to confer, since the hearings, to arrive at language acceptable to them, and to communicate to the Sub-Committee through their spokesmen

their views and their proposed language. The language thus arrived at has been submitted also to the Interstate Commerce Commission, and we have been officially notified of the Commission's approval thereof. It appears to your Committee that the major defects in the present Statute would be corrected by the new language, and the major objectives of S. 1384, as introduced, would achieve *without unduly restricting contract carriage.*" (Emphasis supplied.)

The Report is speaking, of course, of S. 1384 as proposed to be amended by the Committee, deleting the objectionable features of Sections 1 and 2 thereof pointed out, *supra.* The proposed amendments to S. 1384 are then set out in the Report. They strike from S. 1384 as introduced the features to which the contract carriers and their representatives had objected, under which the Commission would have been granted authority to deny applications for contract carrier permits upon those bases.

The House of Representatives issued its Report No. 970 to accompany H. R. 8825, this bill being identical to S. 1384 as enacted. The Report, in stating the purpose of the proposed legislation, makes no mention of any intention to permit the Commission to deny a contract carrier application upon the ground that common carrier service is allegedly available.

In support of our statement heretofore made that the legislation enacted was compromise legislation, the compromise, insofar as here pertinent, being in striking from the bills "and not provided by common carriers" and "that existing common carriers are unwilling or unable to provide the type of service for

which a need has been shown," and "special" we refer to page 2 of House Report No. 970 as follows:

> "Hearings were held on H. R. 8825 by the Transportation and Communications Subcommittee of this committee on July 23, 1957. A predecessor bill, H. R. 5123, was introduced *at the request of the Interstate Commerce Commission to implement its Legislative recommendation No. 6 contained in its Seventieth Annual Report to the Congress.* The latter bill was not satisfactory to various groups affected by this legislation. Further conferences were held among these groups and a compromise bill was prepared as a substitute for H. R. 5123." (Emphasis added.)

The legislative history clearly indicates that by enactment of S. 1384 the Congress intended it as a mandate to the Commission to effectuate the National Transportation Policy and so to administer the Act as to recognize and preserve the inherent advantages of both contract and common motor carrier service. In this connection the Committee on Interstate and Foreign Commerce of the Senate, in the concluding statement of its Report, said:

> "Common and contract carriage are unlike; the degrees of regulations applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as to properly reflect these differences."

Further, in this same connection, Senator Smathers inserted in the Congressional Record of August 8, 1957, at page 12770, a statement in explanation of the bill, where he stated that the differences between contract

and common carriers by motor vehicle are important and meaningful at law and in practical effect, and:

> "What the Committee has attempted to do, among other things, is to preserve genuine contract carriage for its proper role in our transportation economy."

The position adopted in brief by appellant Commission to the effect that the Commission voluntarily agreed to omission of the objectionable features of the amendments with a view to continuation of application of the old standards and tests is contra to the record. The record establishes that the Commission gave ground inch by inch in the face of mounting opposition, and that it never did completely acquiesce. At the sake of repetition, S. 1384, as introduced, contained three objectionable features: (1) In the proposed amendment to Section 203(a)(15), the first objectionable feature was the phraseology "for the furnishing of transportation services of a special and individual nature"; the second objectionable feature was the phraseology "and not provided by common carriers"; the objectionable feature in the proposed amendment to Section 209(b) was the phraseology "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown".

Chairman Clarke, of the Commission, in testifying before the Sub-committee (Hearings 23-24), agreed to eliminate "that existing common carriers are unwilling or unable to render the required type of service." In his testimony, he agreed to no other change in S. 1384.

At the adjournment of the hearings on May 9, 1957, Mr. Robertson, speaking for the common carrier in-

terests, (Hearings, pages 345, et seq.) also agreed to omit the "special" and the "and not provided by common carriers" objectionable features. At no time did any representative of the Commission appear before the Subcommittee and publicly state that it was the secret intention of the Commission to interpret the new legislation contrary to the obvious intent of the Senators and to the understanding and agreement of all affected parties. It is true that Chairman Clarke did, belatedly, on May 21, 1957, (Hearings 43) write a letter to the Chairman of the Subcommittee in which he agreed to omit "and not provided by common carriers", and that he went on to say in the letter, rather than by public statement:

> "These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position, and with the standard *already provided in the bill respecting special and individualized services.*" (Emphasis added.)

It is significant that in the bill as finally enacted the "special and individualized services" feature was omitted, and substituted therefor in the amendment to Section 203(a)(15) was the phraseology *"transportation services designed to meet the distinct need of each individual customer."*

Nowhere in the legislative history of the amendments will there be found any intimation on the part of any member of Congress that the opinion of Mr. Clarke was that which was intended to be the end result of the amendments. If such had been the case, the end result could have been accomplished simply by saying that the Commission was authorized to determine the number of contracts which a contract carrier might

lawfully hold, and that otherwise the administrative criteria previously applied by the Commission were approved. It is reasonably certain, in our opinion, that had the Chairman of the Commission made the statement publicly which he made in his late-written letter, his opinion would have been denounced by the Congress in no uncertain terms. Most certainly nowhere does it appear that any representative of the contract motor carrier industry was advised of the letter and, in this connection, it is most significant that neither Senate Report No. 703, House Report No. 970, nor the Statement of Senator Smathers inserted in the Congressional Record, August 8, 1957, page 12770, give any indication of knowledge of or agreement with the *ex parte* opinion of Chairman Clarke.

ARGUMENT

(a) It is conceded that common carriers may perform specialized services and that the Commission may, to an extent, exercise discretion, but that only within the ambit of authority granted by Congress

In limine, let us assure the Court that we have no argument with the position of the Commission, discussed at such length in its report (R. 29), and argued at such length by appellants in brief, to the effect that a common carrier may perform, within the purview of its certificate of convenience and necessity, a specialized service *as a common carrier*, offering its services to the public at large, serving the public indiscriminately and rendering only those services and at the charges prescribed by its published rates and tariffs. It may not dedicate its equipment to the exclusive use of one shipper unless it is prepared, as well, to dedicate similar equipment to the exclusive use of all shippers who would avail of its services. It cannot

enter into special contracts and arrangements "for the furnishing of transportation services designed to meet the distinct need of each individual customer", but must deal with all shippers indiscriminately, and no one shipper can make a demand upon the common carrier for service which the carrier is not prepared to perform for the public at large.

There is no evidence in this record that U.S.A.C. has ever assigned motor vehicles for a continuing period of time to the exclusive use of any shipper served by it, nor that it proposes to furnish equipment for the exclusive use of the shipper supporting this application. The most that U.S.A.C. proposes in this respect is to place a modified trailer at Indianapolis, which trailer, under the provisions of the tariff of U.S.A.C. on file, would remain under the direction and control of U.S.A.C.

Neither do we have any argument with the position that in passing on applications, the Commission, to an extent, may exercise a degree of discretion, but we do vigorously insist that such discretion may be exercised *only within the ambit of the authority vested in the Commission by Congress.* Where no authority to exercise discretion exists, no discretion may be exercised, and the Commission perforce must act within the limits prescribed by Congress.

Here we have a situation where from enactment of the Act in 1935, until passage of the involved amendments in 1957, the Congress had given the Commission little to guide it in passing on contract carrier applications, either by way of definition of contract carriage or be delineation of tests to be applied in determining whether granting of the application would be consistent with the public interest. A contract car-

rier was simply a motor carrier who operated under individual contracts or agreements; the permit was to be granted if it would be consistent with the public interest. And, thus, the door was left wide-open for the Commission, in the exercise of its discretion, to run rampant in all directions in devising and applying tests to restrict contract carriage for the benefit of common carriage. In many instances, the Commission "met itself coming back"; it devised test after test, repudiated test after test, and finally went to Congress and asked for specific authority to deny contract carrier permits by application of the "specialization" test, or where the proposed service was not provided by common carriers, or where existing common carriers are unwilling or unable to provide the type of service proposed by the contract carrier. The different tests formulated, applied and rejected over the years are ably discussed in the brief of Contract Carrier Conference of American Trucking Associations, Inc.

In response to the request of the Commission for authority to deal with contract carrier applications, the Congress struck down all requests except to the extent that it invested the Commission with authority to limit the number of contracts which a carrier might hold and to impose certain limitations and restrictions not here pertinent, on the transportation to be performed.

The Congress re-defined "contract carrier" and said that such carrier was one which engages in transportation subject to the Act "under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continu-

ing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." Section 203(a)(15) of the Act).

It provided in Section 209(b) that, other prerequisites being met, contract carriage permits *"shall be issued"* if the proposed proposed operation is found to be consistent with the public interest. And, at that point, and in view of the chaos in the industry existing over the years as a result of the Commission's formulation and application of inconsistent, unreasonable, and unlawful tests in defining what was consistent with the public interest (see *United States* v. *Contract Steel Carriers,* 350 U.S. 409.) the Congress was constrained to and did specifically instruct the Commission as to what it might consider in determining whether granting an application would be consistent with the public interest. This legislation, it must be recalled, was not requested by the Commission; the Commission wanted authority to say that it would not be consistent with the public interest to grant the permit, as a contract carrier, if a common carrier was performing the same type service, or if a common carrier averred its willingness and ability so to do. In specifically denying the request for such authority, the Congress formulated its own rules for the Commission to apply and incorporated them in the amendment to Section 209 (b) of the Act as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy declared in this Act, the Commission shall consider (1) the number of

shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers and (4) the effect which denying the permit would have upon the applicant and or its shipper and (5) the changing character of that shipper's requirements." (We have added the numerals).

The Commission in its report, and the appellants in their briefs, urge that the discretion of the Commission in determining what will be consistent with the public interest is not circumscribed by the foregoing five tests specifically prescribed by Congress, but that it may go *aliunde* these tests and apply additional tests of its own formulation. And, we respectfully present, and as was found by the court below, that is precisely what the Commission has done in the instant case and in passing on other contract carrier applications since enactment of the amendment, reverting to the position it had assumed prior to enactment of the amendments and, as a sixth test, applying the old "adequacy-willingness-ability" of common carriers test.

In our considered opinion the maxim *inclusio unius est exclusio alterius* comes into full play. Such maxim, perhaps, would not apply as to criteria not specifically considered by Congress, but here we have a situation where Congress was specifically asked for authority to permit application of this sixth test, considered same, and did not grant such authority, and we believe it to be amply clear from the legislative history of the

amendments that it was the purpose and intent of the Congress that contract motor carriage be treated as a separate and distinct mode of transportation, entitled to all the benefits of the National Transportation Policy, and that if a need was shown for contract carriage it would be immaterial whether a common carrier was authorized to perform the involved transportation as a common carrier or whether a common carrier averred its willingness and ability so to do.

The Commission, in its report, and appellants in their briefs, urge that the Commission will be unduly restricted in implementation of the National Transportation Policy if it is limited to living within the law and applying the five tests enumerated. We say, however, without fear of successful contradiction, that subsequent to the amendments of 1957, the Commission *must* live within the amended Act, and that it cannot by administrative edict frustrate the will of Congress and continue to construe and apply the law and the presumed powers of the Commission as the Commission did prior to the amendments. In *Ziffrin, Inc. v. United States*, 318 U.S. 73, Congress had amended Section 210 of the Act. This Court held that subsequent to the amendment the Commission was bound to apply the Act as amended. stating at page 78:

> "We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered."

The court below is taken to task by appellants for holding that the Commission, itself a creation of the Congress, must be governed by the authority granted to

it by the Congress, and that it cannot formulate and apply a sixth test of its own. As this Court said, however, in *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 15, 80 S. Ct. 1570, in dealing with the amendments to Section 209(b):

> "This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress. Thus, the decision of the District Court must be reversed, because we conclude that the Commission fell into error of law."

We construe the decision of the Court in the *American Trucking Associations* case, *supra*, to mean that the Commission must live within the amendments to Sec. 209(b), and that it cannot, as it there did and has here done, apply tests *aliunde* the Act as amended.

(b) In determining whether grant of a contract carrier permit will be considered to be consistent with the public interest, it is immaterial whether a common carrier avers a willingness and ability to perform a similar transportation service as a common carrier

The court below did not say, as is urged by appellants, that the Commission could give no consideration to the existence of common carriage in determining whether grant of a contract carrier permit would be consistent with the public interest, but it is our position that it should have done so. We believe it clearly to have been the intent of Congress that what was or was not consistent with the public interest was to be determined by the application of the tests laid down by Congress, and the legislative history definitely estab-

lishes that it was the understanding of the Congress that by elimination of the features to which objection had been made by the Department of Justice, the Department of Commerce, associations representing the contract carrier industry, shippers using contract carriage service and contract carriers that the existence or non-existence of motor common carrier service or the averred willingness and ability of a motor common carrier could *not* be looked to by the Commission in determining whether a contract carrier permit should be granted. But that is precisely what the Commission has here done in interpreting and applying the law, exactly as it did prior to to the amendments of 1957.

We believe it to be clear from the legislative history of the amendments that the Congress did not intend for the Commission to be empowered to deny contract carrier applications upon the ground that the proposed service was provided by common carriers (Congress deleted "and not provided by common carriers" from the amendment to Section 203(a)(15) suggested by the Commission), and that the Commission may not deny a contract carrier permit upon the ground of failure of the applicant to show "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown", which language was deleted from the amendments to Section 209 (b) suggested by the Commission, and the five enumerated tests substituted therefor.

Obviously, in the light of the deletions above, and in the light of the legislative history set out at length *supra*, Congress did not intend for the existence or non-existence of common carrier service, as such, to be a determinative factor with respect to contract carrier

applications, a need having been shown for contract carriage.

We respectfully present that had it been the intent of Congress simply to remedy the situation as to the number of contracts which could be held by contract carriers, this being the position taken by appellants in brief, then the Congress logically would have enacted only the concluding portion of the amendment to Section 209 (b) as follows:

> "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service . . ."

But this the Congress *did not do*; it amended 203(a)(15) to redefine contract carriage, and it further amended Section 209(b) to set out the tests which were to be applied in determining consistency with the public interest. And, we respectfully present, that only by ignoring the intent of Congress as reflected by these portions of the amendments, and adopting the view of appellants that the sole purpose of the amendments was to limit the number of contracts which a contract carrier might hold, can the position of appellants be sustained and the action of the Commission, as reflected by its report, be approved.

(c) Contract motor carriage is a separate mode of transportation and, as such, entitled to the protection of the National Transportation Policy

We believe contract motor carriage to be a separate mode of transportation, and that as such it is entitled to the benefit and protection of the National Transportation Policy and that it is incumbent upon the Commission to so administer the Act as to retain the inherent advantages incident to contract motor carriage. In order, however, to avoid the duty upon it resting, the Commission, in refusing to grant to contract motor carriage the benefit of "fair and impartial regulation" and in refusing "to recognize and preserve the inherent advantages" of contract motor carriage says:

> "Contract and common carriage by motor vehicle are not separate modes of transportation but rather are subdivisions of the same mode, that is, motor transportation." (R. 49).

And this, we submit, directly in the face of the fact that since Congress first undertook regulation of the motor carrier industry by enactment of the Motor Carrier Act of 1935, Congress has specifically recognized and defined contract motor carriage as a separate mode of transportation, and throughout the years has dealt with contract motor carriage as a separate mode of transportation. The amendments of 1957 even more clearly point up the fact that it was the intent of Congress that contract motor carriage be considered a separate mode of transportation, and entitled to the benefit of protection under the National Transportation Policy. The only thing the two types carriage have in common is that they use trucks and operate over the highways. In every other respect, they are separate, distinct, and different modes of transporta-

tion. In the Act, itself, you begin with the definitions "Section 203(a)(14)(15); a common carrier operates under a certificate of convenience and necessity which can be obtained only upon a showing that the present or future public convenience and necessity require such transportation, whereas a contract carrier operates under a permit, with contracts with individual shippers, which permit is obtained upon a showing that the transportation is consistent with the public interest; the limitations and restrictions upon the two modes of transportation prescribed by the Act are different, and the regulation of the two modes by rules promulgated by the Commission is essentially different.

We readily agree with the Commission and appellants, that the only way in which the Commission can avoid the impact of the National Transportation Policy with respect to contract motor carriage is to say that such is not protected thereunder because *it is not a mode of transportation,* but is a "subdivision of the same mode." Carried to its ultimate conclusion, this position means, of course, simply that the Commission believes that contract motor carriage is not entitled to the benefit of the "fair and impartial regulation" required by the National Transportation Policy for "all modes of transportation subject to the provisions of this Act", and that the Commission is under no duty so to administer the Act "as to recognize and preserve the inherent advantages of each" insofar as contract carriage is concerned. In other words, the Commission says the contract motor carrier industry is a subdivision of a mode and, as such, is entitled to no recognition and no protection under the National Transportation Policy as enunciated by Congress. Such statement, in our opinion, fairly summarizes the

position of the Commission and of appellants in this case, and demonstrates the unlawfulness thereof.

Permeating the report of the Commission, as well as the briefs of appellants, is that very distinct theory that in construction and application of the Act, the Commission may permit a common carrier to perform contract carrier service as it would permit U.S.C.A. to do in the case at bar, but that when it comes to determining whether a contract carrier permit will be granted, it may devise and apply any test which it may conceive to deny a contract carrier permit for the benefit of motor common carriage.

Throughout the hearings on S. 1384, contract carriage was referred as a different mode of transportation—see the testimony of Mr. Earle O. Oren and his interrogation by Senator Purtell at page 186 of Hearings. And as to the treatment of contract carriers over the years, at the hands of the Commission, a representative of the industry at page 183 of Hearings testified:

> "Although the traditional difference between common and contract carriers has been this matter of a general holding out to serve the public as against a special service rendered to particular businesses, the Interstate Commerce Commission over the years has also built up a series of precedents in which it is held that contract carriers must be specialized as well as limited to serving individual shippers. And we have been limited. We have been limited by interpretations, by rules, by regulations, until today we can haul one way without compensation for return, and we can haul only special commodities, and we must haul them according to their intended use, and it is getting to be a problem to know when you are in business legally and when you are not in business legally."

In anticipation of just exactly what has occurred in the case at bar, the witness said, with respect to the import of S. 1384 before it was amended, Hearings page 185:

> "So this legislation will permit contract carriers to pioneer in new and specialized fields, and then permit the common carriers to move into the fields as soon as they become profitable, and oust the contract carriers simply by offering the same service. In the light of the attitude of the ICC in the past, there can be no question that the ICC will in such circumstances force contract carriers to withdraw as soon as common carriers decide they wish to offer any particular kind of service."

And then, in response to further questions by Senator Purtel, the evidence heard by the Senators with respect to S. 1384, before amendment, as appears at Hearings page 188, is as follows:

> "To begin with, this legislation is inconsistent with the National Transportation Policy declared by Congress in 1940. In the Act of September 18, 1940, Congress declared the National Transportation Policy to be to provide for 'fair and impartial regulation of all modes of transportation' in order 'to recognize and preserve the inherent advantages of each' and 'to promote safe, adequate, economical and efficient service'.
>
> "I believe that the proposed legislation is inconsistent with each of these objectives. In effect, the proposed legislation would legislate contract carriers out of existence rather than provide a fair and impartial regulation of all modes of transportation. It would fail to recognize and would destroy rather than preserve the inherent advantages of contract carriage. Furthermore, it would promote uneconomical and inefficient service by

limiting or eliminating one important mode of transportation by reducing the present limited amount of competition in the field and by encouraging higher costs in rates rather than lower. In this connection, I call attention to the report of the Senate's Small Business Committee, 84th Congress, 2d Session, Senate Report 1693, which severely criticizes the ICC for the restrictive policies which it has followed, and calls for increased competition and lifting of restrictions in the transportation field rather than a tightening of restrictions."

And in the light of the testimony above, such being representative of the great mass of similar testimony, the Congress did continue to recognize contract motor carriage as a mode of transportation, and refused to enact legislation requested by the Commission which would have permitted the Commission to further favor common carriers over contract carriers in their efforts to obtain authority to serve the public, but in the case at bar the Commission has ignored the mandate of Congress and has continued to apply the tests it formulated under the law as it existed before the amendments of 1957.

(d) The Reports of the Commission and the Opinion of the Court below

The first report of the Commission, Division 1, was handed down on January 31, 1958, (R. 22). Petitions for reconsideration were denied on July 25, 1958, (R. 28). In the first report, no mention whatsoever was made of the amendments to Sections 203(a)(15) or 209(b) of the Act, and the contract carrier application was denied upon the basis of the finding that (R. 26):

> *"The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet."* (Emphasis supplied.)

The Commission then cites previous decisions by it in which, prior to the amendments of 1957, the "willingness and ability" of common carriers test had been applied in passing on contract carrier applications.

As pointed out, *supra*, J - T challenged validity of the foregoing order of the Commission by action instituted in the United States District Court for the Western District of Missouri on August 18, 1958, following which the Commission reopened the proceeding for consideration upon the present record, held same under advisement until June 25, 1959, and then handed down a further report (R. 29) which, in our opinion, constitutes nothing more nor less than an abortive attempt on the part of the Commission to justify its continuing application of the "willingness and ability" test, as well as imposition upon contract carrier applicants of the burden of showing that common carriers are unable or unwilling to perform the proposed transportation. The first report (R. 26) was not repealed, and the theory thereof permeates the more elaborate report (R. 29).

The Commission (R. 45) concedes that the operations proposed come within the new definition of contract carriage, i.e., they will be performed under contract, vehicles will be assigned for a continuing period of time to the exclusive use of each person served, and the carrier will furnish services designed to meet the distinct need of each individual customer.

At R. 37, *et seq.*, the Commission establishes that prior to the amendments of 1957, in each instance where a contract carrier application was opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application and, at R. 38, says:

> "For many years this principle has been followed in disposing of applications for contract carrier permits opposed by common carriers, the decisive factor being whether the available common carrier service was reasonably adequate to meet the transportation needs involved."

At R. 41, the Commission indicates its belief that Congress did not intend or even contemplate "the abandonment of our long-continued practice", and at R. 43, the Commission establishes that subsequent to the amendments of 1957, it has persisted in denying contract carrier applications where the applicant has failed to assume and carry the burden of proof of showing that common carriers were unable or unwilling to provide the proposed service as common carriers.

Such a burden was placed squarely upon the applicant in this proceeding in that the Commission at R. 47 says:

> "... We cannot find that existing service has been shown to be inadequate."

This, we respectfully present, is precisely the burden which Congress indicated the contract carrier applicant should neither be required to assume nor carry.

In dealing with the five tests contained in Section 209 (b), the Commission concedes (R. 45) that the

applicant meets tests Nos. 1 and 2; with respect to test No. 3, the effect which a grant of authority would have upon the services of protesting carriers, the Commission concludes (R. 46) upon the basis of its finding at R. 42:

> "There is, in effect, a *presumption* that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before."

The Commission then holds that a grant of authority to applicant would have an adverse effect upon U.S.A.C. We say, without fear of successful contradiction, that there is not one iota of evidence in the record as to what effect, if any, granting of the application would would have upon U.S.A.C.

In dealing with test No. 4 (R. 46) the Commission says that "whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements", with no consideration whatsoever being given to whether the services available are designed to meet the distinct need of the shipper. In finding that the available services of U.S.A.C. are "adequate" the Commission does so upon the basis that U.S.A.C. has transported airplane parts for other manufacturers—with no evidence of record as to the requirements of the shippers heretofore served by U.S.A.C. or as to the distinct needs of those shippers, in comparison with the established distinct needs of the shipper supporting the application.

At page 47, the Commission makes this statement:

> "Furthermore, it [U.S.A.C.] is willing to dedicate certain of its trailers to the exclusive use of each of the shippers."

With all the force at our command we challenge the accuracy of the foregoing statement. It is not supported by the record.

In disposing of test No. 5, (R. 47-48), the Commission construes this test to apply only if there is a change in the shipper's requirements which would necessitate acquisition of additional operating authority. Such, we present, does violence to the obvious intent of this test which was designed to afford a shipper a flexible transportation service which could easily be adapted to change in characteristics and specifications of commodities, production schedules, etc.

The report of the Commission, as are the briefs of appellants, is permeated with the old theory of "adequacy" of common carrier service and "willingness and ability" of common carriers, with the burden to be upon the contract carrier applicant to negative the existence of "adequate" common carrier service, the position of the common carrier being buttressed by the presumption in which the Commission indulges to the effect that a common carrier will be adversely affected by the grant of a contract carrier application even though it has never participated in handling of the involved traffic or has any assurance that it will ever participate in the handling thereof. It is of significance that neither the report of the Commission nor the briefs of appellants make any reference whatsoever into the uncontradicted fact that applicant proposes a service "designed to meet the distinct need" of the supporting shipper, nor to the legislative history of the amendments which clearly indicate the intent of Congress to relieve the contract carrier applicant of the burden of proof with which the Commission had onerated it.

Insofar as the opinion of the Court below is concerned (R. 160), we feel that we would be "gilding the lily" should we be so presumptuous as to endeavor to elaborate thereon. The opinion was obviously most carefully and painstakingly prepared. It considers the facts as found by the Commission, reviews the action of the Commission in dealing with contract carrier applications before the amendments of 1957, the legislative history of the amendments, the reports of the Commission subsequent to the amendments, and comprehensively considers and determines questions of law presented. The opinion speaks for itself and we have no inclination other than to be governed thereby, and to urge that it should be affirmed.

The appellants take the Court below to task for allegedly usurping functions of the Commission in passing on questions of fact. Such, in our judgment, is not the case, but, as this Court said in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83, 88:

> "Just as we would over-step our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

(e) Authorities

Our research discloses only two reported cases dealing with the 1957 amendments to Sections 203(a)(15) and 209(b) of the Act. In *Elvin L. Reddish v. Interstate Commerce Commission, et al.*, 188 F. Supp. 160, the United States District Court for the Western District of Arkansas held invalid an order of the Commission denying an application for a contract carrier permit upon the ground that common carriers averred

a willingness and ability to perform the proposed transportation, and upon the authority of its report in the case at bar. The three-judge court for the Western District of Arkansas cited with approval the opinion of the Court for the Western District of Missouri in the case at bar and overruled the Commission. Such case is now pending on appeal before this Court at this term in Nos. 49, 53 and 54.

In *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1, 80 S. Ct. 1570, the action of the Commission in refusing to impose normal restrictions upon contract carrier permits to a contract motor carrier owned by a railroad was challenged.

As said at 364 U.S. 1, 14:

> "The Commission assigned but a single reason for not imposing the normal restrictions upon the Pacific Motor permits: to do so would compel Pacific Motor to conduct a common carrier service. Appellees support this decision upon the ground that the Commission is without authority under Section 209(b) to impose such character-destroying conditions upon a contract carrier permit."

In footnote 9, the Court quotes Section 209(b), italicizing the amendment thereto of 1957, with this comment:

> "The italicized portion was added by an amendment of August 22, 1957, 71 Stat. 411, well before the Commission's decision of September 9, 1958. Consequently, the Commission was required to apply the new standards. *Ziffrin, Inc.* v. *United States,* 318 U.S. 73, 78, 63 S. Ct. 465, 468, 87 L. ed. 621."

At page 15, the Court observed:

> "We do not condemn the wisdom of the Commission's action. We simply say that the transpor-

tation legislation does, and that the pardoning power in this case belongs to Congress."

With respect to the plethora of opinions of the courts and reports of the Commission cited by appellants in brief, we respectfully present that substantially all thereof are either not in point or have been superseded by subsequent legislation. Insofar as the reports of the Commission are concerned, while over the years they have been inconsistent in the application of tests to be applied in denying contract carrier permits, we deem it to be immaterial whether prior to the amendments of 1957, when the Commission had no yard-stick to guide it in determining what would be consistent with the public interest, it frequently imposed upon a contract carrier applicant the burden of showing that no common carrier service was available, able or willing to perform the proposed transportation. Reports of the Commission subsequent to the amendments of 1957, also so holding, predicated upon the same grounds as the report in the case at bar, constitute nothing more nor less than an effort by the Commission to pull itself up by its own boot-straps, and such reports will either stand or fall depending upon the decision of the Court in this case.[3]

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[3] Apparently since the opinion of the lower Court was handed down in the case at bar, followed by the opinion of the Court in *Reddish* v. *Interstate Commerce Commission, et al.*, 188 F. Supp. 160, the Commission has recognized its error in applying the "willingness and ability" of common carriers test in passing on contract carrier applications, and has conceded that it is limited to applying the five tests set forth in Section 209(b) of the Act. See, for example, the decision of the full Commission in *Tam Fertilizer Carriers, Inc.,—Contract Carrier Application*, No. MC-117568 (December, 1960) 84 MCC 56, and the report of Division 1 of the Commission in No. MC-119898, *W. G. McCarty—Contract Carrier Application* (May 31, 1961), not yet reported.

With respect to the opinions of the Courts prior to the amendments of 1957, approving actions of the Commission in denying contract carrier permits, such opinions were handed down when the door was wide open to the Commission to apply tests of its own choosing in determining what would or would not be consistent with the public interest and, in the absence of legislative restriction, the courts were justified in recognizing and approving the exercise of administrative discretion by the Commission. In the light of the amendments of 1957, such opinions are beside the point insofar as determination of the issues in the instant cause are concerned.

A number of court opinions dealing with finance applications under Section 5 of the Act are cited. They are beside the point. There the standard for approval was whether consummation of the transaction would be consistent with the public interest, with no yardstick to guide or limit the Commission, and there, as well, in each instance and in each case cited, the proposed transaction contemplated the extension of a new *common carrier service* into a territory already adequately served by *common carrier service,* and no question of contract carrier service was involved. Such statement applies, as well, to the numerous cases cited dealing with questions under other acts as to what will and will not be considered to be "consistent with the public interest."

There are cited, as well, a number of cases where contract carrier applications for permits to transport *passengers* were denied in the face of opposition by common carriers, but here it should be recalled that common carriers under the terms of Section 208(c) of the Act *can and do perform a contract carrier service*

in the transportation of passengers, and the contract carriers in those cases were not rebuffed because of the existence of common carrier authority to transport passengers as common carriers, but because of the existence, willingness and ability of such carriers to transport passengers *as contract carriers.*

We will refer, however, briefly to the decisions which the Commission and the appellants deem to be of particular pertinence in this litigation. Reference is made to *Schaffer Transportation Company* v. *United States,* 355 U.S. 83, 78 S. Ct. 173. There the Commission had denied the application of a common carrier to provide service between points then served exclusively by rail, upon the basis that rail service was "reasonably adequate" to meet the transportation requirements of the shipper. The Court held that the National Transportation Policy, formulated by Congress, is the yardstick by which the correctness of the Interstate Commerce Commission's actions will be measured, and ruled that the Commission had failed to evaluate the "inherent advantages" of the motor service proposed. It is our judgment that in the case at bar, the Commission has failed to evaluate the "inherent advantages" of the contract motor carrier service proposed and that in no sense does the *Schaffer* case support the position of appellants.

Reference is then made by appellants to *American Trucking Associations, Inc., et al* v. *United States, et al.,* 344 U.S. 298, 73 S. Ct. 307. There the court had under consideration the authority of the Commission to promulgate rules regulating leasing of equipment by certificated carriers and interchange of equipment with other certificated carriers. The court held that under the Act and the rule-making and regulatory powers

thereby specifically vested in the Commission the Commission had authority to promulgate the rules in question. In contra-distinction to the case at bar, the Commission had acted within the scope of its authority contained in the Act, and it had not applied to Congress for an extension of authority and been rebuffed, as is here the case, and then persisted in the exercise of authority denied to it by the Congress.

The Commission in its report, and the appellants in brief, rely on the opinion of the court in *Wilson Bros. v. United States of America, et al.*, (W.D. Mo. 1953) 114 F. Supp. 814. Such decision does not appear to be material to the issues in the case at bar. The opinion was handed down in 1953, at which time the statutory definition of "contract carrier" was broad and, insofar as here pertinent, there was no definition of what would be considered to be consistent with the public interest. Neither was there any limitation on the exercise of discretion by the Commission in defining issues determinative of granting or denying an application for a contract carrier permit. In such case no question of statutory construction was before the court; no question of legislative history of any Act was considered; the definition of contract carrier then extant has now been amended, and the five tests prescribed by Congress in 1957 had not then been imposed upon the Commission. It appears, therefore, that insofar as the instant case is concerned, the *Wilson* case, *supra*, is authority only for the proposition that the court will examine the evidence to determine whether the Commission has ignored substantial and material evidence, and whether the findings of the Commission are supported by or are *contra* to substantial evidence.

Another case relied upon by the Commission and the appellants is that of *Bass* v. *United States of America*, 163 F. Supp. 1 (W.D. Va., 1958), affirmed 358 U.S. 333, rehearing denied 359 U.S. 956. There, as here, the United States and the Interstate Commerce Commission took the position that contract motor carriage was not a mode of transportation and, therefore, was not entitled to the benefit of the National Transportation Policy. The defendants in the court below could not persuade the court that such position was sound.

While at first blush the decision in the *Bass* case, *supra*, might appear to be *contra* to the position assumed herein by J - T, a careful examination of the opinion will establish that such is not the case. There is no indication in the opinion that the applicant in that case proposed a service "designed to meet the distinct need of each individual customer"; further, it does not appear that the attention of the court was directed to the legislative history of the amendments of 1957, nor to the five tests prescribed by Congress to be applied by the Commission in passing on contract carrier applications. It appears, on the other hand, that the law applied by the court in deciding such case was that existing before the amendments of 1957, and that upon the issue of whether contract carriage is a mode of transportation, the Court supported the position of *Bass* in that it refused to accept the position of defendants, United States and Commission, that contract motor carriage was not a mode of transportation entitled to fair and impartial regulation in administration of the Act by the Commission.

And while appellants, in brief, interpret the decision in the *Bass* case, *supra*, as holding that a con-

tract carrier permit will be denied where common carrier service is available, we respectfully present that such was not the decision of the court. The common carriers who oppose the Bass application were *carriers of passengers;* under Section 208(.) of the Act, they were engaged, as *contract carriers,* in transporting passengers and were providing precisely the same service as that proposed to be performed by *Bass.* In other words, there was no conflict between common and contract carriage, but it was simply a proposition of one contract carrier attempting to invade a field already occupied by another contract carrier service. The decision in the *Bass* case has no bearing on the case at bar.

Reference is made in brief and appellants rely upon the opinions in *Ratner* v. *United States,* 162 F. Supp. 518, 519 (S. D. Ill. 1957), affirmed 356 U.S. 368; *Herrin Transportation Company* v. *United States,* 108 F. Supp. 89, 94-95 (E. D. La. 1952), affirmed 344 U.S. 925, rehearing denied 345 U.S. 914; *Houff Transfer, Inc.* v. *United States,* 105 F. Supp. 851, 855 (W. D. Va. 1952); *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J. 1951), affirmed 343 U.S. 944. It is respectfully presented that neither of these cases have a remote bearing on the issues in the case at bar. In each instance they involved finance applications in which *motor common carriers* sought to acquire the operating rights of *other motor common carriers* and control such operations under Section 5 (2) of the Act. In each case, one *common carrier* was seeking to extend its operations by purchase and control into a territory already served by other *common carriers.* The only yardstick in the Act by which the Commission was to be guided was the requirement

that the proposed transaction be found to be consistent with the public interest, with no delineation of any test to be applied in determining whether such transaction would be consistent with the public interest. As we have said, the door was wide open for the Commission to exercise its discretion in granting or denying the applications and the courts, in the absence of a finding of abuse of discretion, were perforce constrained to approve the action of the Commission where, in the cases cited, the Commission had made adequate findings based upon substantial evidence. The cited cases are simply not in point insofar as the litigation at bar is concerned.

In the next place appellants cite and rely on the unreported decision in *Alexandria, Barcroft and Washington Transit Company* v. *United States* (E.D. Va., 1961) 14 F.C.C. section 81,395. Here the court had before it the question of whether the transportation of passengers by common carrier under section 208(*c*) was common or contract carriage when performed by a common carrier over its regular routes. The court held that the transportation of passengers by a common carrier under contracts over its regular routes was service permitted to be performed by a common carrier under section 208(*c*), and such being the only issue before the Court, the observations of the court with respect to matters not in issue are *obliter dicta*. At any rate, the court did not have before it for consideration the amendments of 1957 nor any of the issues which are presented in the instant litigation.

The next case cited and relied upon by appellants is *Doyle Transfer Company* v. *United States*, 45 F. Supp. 691 (D.D.C. 1942). There an order of the Commission denying a "grandfather" application was under

attack. The Commission, in denying the application, had applied the "specialization" test then in its favor. The opinion in such case has no bearing on the issues in the litigation at bar, but it is of significance in showing the error of the statement of appellants in brief that the Commission, through the years, had uniformly applied the "willingness and ability" of common carriers test in passing on contract carrier applications.

The "specialization" test was in favor with the Commission when the Doyle application was denied.

All other cases cited and relied upon by appellants are, we respectfully present, either cases dealing with common carrier applications where a common carrier seeks to invade a territory already being served by other common carriers, or finance cases where the same situation obtains and where there is no criterion to guide the Commission in determining what will be consistent with the public interest, or cases involving the performance of contract carrier service by motor common carriers in the transportation of passengers under section 208(c), and merit no further discussion or consideration.

(f) Summary and Conclusion

We respectfully submit, from the record, we have demonstrated peradventure of a doubt that the Commission had acted unlawfully and without authority in the premises, and that the judgment of the lower court should be affirmed.

We are met, of course, with the plea on the part of appellants that the Commission, as a body of experts, is entitled to exercise its expertise and discretion in passing on applications for contract carrier permits. We challenge the authority of the Commission so to do.

Discretion may be lawfully exercised by the Commission only to the extent that exercise thereof is permitted by the Congress. From the legislative history of the 1957 amendments to the Act, it is clear that the Commission is completely devoid of authority to deny a contract carrier's application for a permit, all other prerequisites being met, solely upon the ground that a common carrier avers its willingness to attempt to perform, as a *common carrier,* the transportation service for which a need for *contract carrier* service has been shown. That, however, is precisely what the Commission has done in the case at bar.

The Commission went to the Congress and requested specific authority to deny contract carrier applications either on the ground of the "specialization" test, or on the ground that the applicant was not a contract carrier if the proposed transportation was provided by common carriers, or in the absence of a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown. It made these recommendations in both its 69th and 70th reports to the Congress, and it incorporated them in bills and resolutions submitted to the first session of the 85th Congress. Congress refused to grant the requested authority; it refused to onerate applicants for contract carrier permits with the burden of showing that common carriers, as such, were unable or willing to provide the proposed service; the Congress substituted its own language for the proposed amendment to section 203(a)(15) and said that a contract carrier was one who performed a service under contracts "(a) for the furnishing of transportation services through the assignment of

motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer".

And, whereas, theretofore, the Commission had had a free hand in determining what it might deem to be consistent with the public interest, the Congress laid down five tests to be applied by the Commission in determining whether grant of contract carrier permits would be consistent with the public interest. It repudiated all other tests suggested by the Commission.

Here, however, you have a report of the Commission, not repudiating but repeating and elaborating upon a previous report on the same record holding that the application is denied for the sole reason that the applicant for contract carrier authority has not assumed and carried the burden of showing that common carriers cannot or will not, as common carriers perform the involved transportation. We are confronted with a report which is permeated with the outlawed "adequacy" or "willingness and ability" of common carriers to perform the same type of service. We are confronted with a report which makes no mention whatsoever of the new definition of contract carriage or the service which the applicant for a contract carrier permit proposes to perform for the furnishing of transportation services designed to meet the distinct need of the supporting shipper. We are confronted with a report which states that the opposing common carrier proposes to dedicate equipment to the exclusive use of the shipper, which statement is not supported by the record.

We are also confronted with a report based upon a *presumption* indulged in by the Commission to

the effect that a protesting common carrier will be adversely affected by grant of the permit even though there is no evidence to support such statement, and in the face of the fact that it is established of record that the protesting carrier has never participated in the involved traffic, and there is no indication of record that it will ever participate therein.

As was held by the court below, the application of J - T was denied by the Commission by the application of a sixth test not authorized by Congress and, we say, by reverting to the construction and application of the Act as it existed prior to the amendments of 1957 and the tests of the Commission conceived thereunder, and by the Commission affirmatively ignoring the amendments of 1957.

Should the position of the Commission be sustained, the practical effect will be nothing more nor less than the emasculation of the contract motor carrier industry, which industry is an essential and integral part of the national transportation system. As appears at page 54 of Hearings, at the time the proposed amendments to the Act were under consideration by Congress, there were 2304 contract motor carriers holding permits from the Commission, serving thousands of shippers having a need for the specialized service provided by such carriers. The Commission says that contract motor carriage is not a mode of transportation which it is required to protect under the National Transportation Policy. The Congress says otherwise. If the Commission is correct in its position, from here henceforth no contract motor carrier will be granted a permit to begin or expand its operations, regardless of the need for a specialized service shown

by the shipper, if a motor common carrier simply comes forward in protest and says "I have not served this shipper; I have no equipment designed to meet the specific needs of the shipper; my tariffs preclude me from designating equipment to the exclusive use and control of the shipper, but I aver my willingness to perform the transportation."

We respectfully urge that by its position and reports in the case at bar the Commission has presumed, by administrative edict, to exercise authority not granted to it by Congress, which authority the Commission had expressly sought and in its effort had been rebuffed; we present that, following its historical pattern, the Commission is seeking to create and maintain a monopoly in favor of motor common carriers; we present that the action of the Commission in the reports here attacked is arbitrary, capricious, not based on adequate findings of fact and based on self-serving conclusions and presumptions without foundation in the record, and that same ignore basic and essential elements of fact which are determinative of the issues; we present, further, that J-T has conclusively established of record that it is a contract carrier and that it has met all five of the prerequisites prescribed by Congress for issuance to it of a permit as a contract carrier, and that denial of such permit by the Commission results from destruction, by administrative edict, of the distinction between common and contract motor carriage, disregard of the express mandates of Congress as reflected by the Act, amendments thereto, and the National Transportation Policy as enunciated by Congress, and is an effort by the Commission to do indirectly by administrative edict that which Congress has expressly declined to permit it to do by direction.

The action of the Commission in denying J - T's application for a permit can, we respectfully present, receive judicial sanction only by reading into the amendments of 1957 those features which were specifically deleted by Congress, i.e., in section 1 of the amendments, (sec. 203(a)(15) of the Act) the proviso that a contract carrier by motor vehicle must be a carrier which provided a specialized service "and not provided by common carriers" and into section 2 of the amendments, (sec. 209(b) of the Act) the proviso that a permit to operate as a contract carrier would not be granted in the absence of a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown".

We respectfully submit that the judgment of the court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 17

INTERSTATE COMMERCE COMMISSION
Appellant,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.
Appellees.

On Appeal From The United States District Court
For The Western District of Missouri

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AN AMICUS CURIAE

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THE INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The League is a nationwide organization of shippers using all forms of transportation, including railroads, motor carriers (both common and contract) water carriers and air carriers. The organization is constitutionally dedicated to the promotion of sound conditions in transportation, and to that end it takes part in many proceedings before the Interstate Commerce Commission and in the courts where issues of national transportation importance are involved.

Broadly speaking, the League has an interest on behalf of its membership, as representative of the general shipping

public, in the principles and policies governing the right of entry into the transportation field; it is concerned that the public need for adequate and competitive service by all modes of transportation shall be given due consideration in the determination of applications for motor carrier licenses.

In particular, the League is concerned that the availability of contract carrier service (as an essential substitute for exempt private carrier operation) shall not be denied simply for the protection of existing common carriers from competition.

This is the first case to present for judicial review the criteria that are being followed by the Commission in contract carrier applications since the statutory standards were changed by amendment in 1957 to the Interstate Commerce Act. In this case the Commission denied an application for contract carrier authority on the ground that "we cannot find that existing service has been shown to be inadequate." (R. 47)

It is the position of the League that contract carrier service cannot lawfully be denied on the ground that there is a common carrier willing and able to perform the transportation.

We point out that the League has no interest in the operating rights of any particular carrier and takes no position in any case with respect to whether the requisite finding of consistency with the public interest is supported by the evidence. The sole concern of the League is that the determination of that issue shall not be made to depend upon the existence of common carrier service.

ARGUMENT

I.

THE 1957 AMENDMENTS CHANGED THE STANDARDS GOVERNING CONTRACT CARRIER APPLICATIONS

The essence of the Commission's view of the case is reflected in the brief for appellant (pages 21, 28) where it is developed that the Commission has long treated the availability of common carrier service as a crucial factor in passing upon contract carrier applications; it is urged that the 1957 amendments did not change the statutory standard so as to impair the validity of that commission policy. In all of this, the Commission stands upon the proposition that the underlying purpose of regulating contract carriers was to promote and protect common carrier service.

We submit that the 1957 amendments clearly express a congressional intention to relax the requirements for entry into the contract carrier field, and this intention was expressed in two ways: First, by imposing a more strict definition upon contract carriers and thus limiting the field for contract carrier operation, Congress reduced the need on the part of true common carriers for protection from contract carrier competition. Second, the Congress in 1957 for the first time specified the criteria for determining contract carrier applications for the future and in so doing it rejected and omitted the very test which the Commission applied in the case at bar.

The future field of contract carriage was narrowed by adding to the definition of contract carrier in section 203(a)(15) the requirement that a contract carrier operate under continuing contract with one person or a limited

number of persons either (a) for the assignment of vehicles to the shipper's exclusive use for a continuing period of time or (b) for the furnishing of services designed to meet a distinct need of each individual customer. Coupled therewith, the Commission was for the first time given authority under section 209(b) to prescribe in a contract carrier permit the number or class of persons for whom the carrier could perform service. Finally, and at the same time, the Congress provided in section 212(c) for conversion to common carrier status of any existing contract carrier whose operations were found not to conform to the new definition.

The total effect of these changes was clearly to decrease the size of the contract carrier field, indeed it permitted restriction of new carriers to service for particular shippers. As a result, the number of contract carriers has been greatly reduced by conversions and the field of operations of newly licensed contract carriers is much restricted as compared with the rights of the former contract carrier, who could aggressively seek new business with an unlimited number of shippers. *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956). These changes appeared to warrant some relaxation of the requirements for entry into the field.

The Congress did relax the requirements for entry into the field of contract carriage by specifying in section 209(b) the limited tests for determining whether issuance of a permit would be "consistent with the public interest and the national transportation policy". In so doing, Congress omitted any reference to the adequacy of existing service or to the willingness and ability of common carriers to perform the transportation service. The omission was particularly significant in the light of the legislative history, as pointed out in the opinion of the learned District Court (R. 166-7). As introduced, the original bills

provided that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." This provision was deleted by Congress after sharp controversy and with the approval of the Commission itself. As finally enacted, the new standards of Section 209(b) were that the applicant be "fit, willing and able properly to perform the service" and that the operation be "consistent with the public interest and the National Transportation policy." In determining the latter, Congress provided explicitly that the Commission should consider:

> "the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

Notwithstanding the congressional enumeration of the above considerations for determining consistency *both* with the public interest and with the national transportation policy, the Commission takes the position that the criteria do not "preclude our consideration of other factors" (R. 43) and "are not the only ones which should or can be considered in the determination of a contract carrier application." (R. 48) They then turned to the national transportation policy itself as warranting an additional test: the willingness and ability of existing common carriers.

In so doing, we submit that the Commission simply nullified the 1957 amendments and that the District Court correctly concluded that the effect of the Commission's decision is to apply the very standard first proposed in the amendment then subsequently withdrawn. (R. 169)

II.

THE COMMISSION'S ORDER WOULD NULLIFY THE DIFFERENCES IN THE STATUTORY STANDARDS FOR COMMON AND CONTRACT CARRIER LICENSING

The definition of a contract carrier in section 203(a)(15) has at all times, both before and after the 1957 amendments, included a parenthetical clause grammatically designed to make common and contract carriage mutually exclusive: contract carriage is "(other than transportation referred to in paragraph (14) and the exception therein)"; paragraph (14) of course defines a common carrier. The plain intention of Congress was to distinguish the two types of carrier. Its intention in this respect is reaffirmed in the 1957 amendments by the provisions of section 212(c) permitting conversion of any contract carrier who was licensed under the old definition but finds himself outside the new definition.

There was sound foundation for the action of Congress in differentiating between the two types of carrier. The foundation consisted of the essential difference in the nature of contract carriage, which is a substitute for private carriage. Commissioner Eastman, who was Federal Coordinator at the time of the enactment of the Motor Carrier Act, 1935, in a concurring opinion in *Keystone Transp. Co., Contract Carrier Application* 19 M.C.C. 475, 498 (1939) explained that the "legitimate purpose" of a contract carrier is to furnish a specialized and individual service "which a common carrier, because of the character of his obligations to the general public, could not well undertake to supply."

If the Commission had preserved the purity of the statutory categories, all might have been well. However, it did not do so. As the court below wisely observed upon a review of past Commission decisions (R. 165) "any difference in the standards and burden of proof on both types of applications became blurred, and sometimes interchangeable."

The present case sharply forcuses the practically identical outlines of the common and contract carrier categories as they have been revamped by the Commission. For in one breath the Commission has here held (R. 45) "that the operation proposed [by applicant] comes within the new definition of contract carriage" and (R. 49) "that the character of shippers transportation requirements is not such as to preclude performance by a common carrier." *This is to say, contrary to law, that a contract carrier service is proposed but a common carrier can perform it.* It appears that U.S.A.C. may have been misclassified as a common carrier and that it should have been issued a permit as a contract carrier, in which event the questions presented in this case might not have arisen.

CONCLUSION

The League hopes that this Court will here render an opinion which will require preservation of the separate statutory categories. Under section 204 of the Interstate Commerce Act private carriage does not require any licensing; as a proper substitute therefor, contract carrier licensing should be governed by the special standards provided in section 209(b), which are different from and less than the standards for issuing common carrier certificates under section 206. The League submits that the decision of the District Court should be affirmed.

Respectfully submitted,

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September, 1961

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SUPREME COURT, U. S.

Nos. 17, 18, 49, 53, 54

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In the Supreme Court of the United States

October Term, 1961

Interstate Commerce Commission, Appellant

v.

J-T Transport Company, Inc., et al.

U.S.A.C. Transport Company, Inc., et al., Appellants

v.

J-T Transport Company, Inc., et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Alabama, Tennessee and Northern Railway Co., et al., Appellants

v.

Ralph L. Brooks, et al.

Interstate Commerce Commission, Appellant

v.

Ralph L. Brooks, et al.

Alabama-Tennessee Transit System, Inc., et al., Appellants

v.

Ralph L. Brooks, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES

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LEON ULMAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 17

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL.

No. 18

U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS

v.

J-T TRANSPORT COMPANY, INC., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 49

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., APPELLANTS

v.

ELVIN L. REDDISH, ET AL.

No. 53

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ELVIN L. REDDISH, ET AL.

No. 54

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., APPELLANTS

v.

ELVIN L. REDDISH, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court in the *J-T Transport* case (Nos. 17 and 18) (*J-T* R. 160-79)[1] is

[1] Citations to the record in the *J-T Transport* case appear as "*J-T* R. —," and to the record in the *Reddish* case as "*R* R. —."

reported at 185 F. Supp. 838; the reports of the Interstate Commerce Commission (*J–T* R. 22–27, 29–52) are printed at 74 M.C.C. 324, 79 M.C.C. 695. The opinion of the district court in the *Reddish* case (Nos. 49, 53 and 54) (*R* R. 398–410) is reported at 188 F. Supp. 160; the report of the Commission (*R* R. 386–95) is printed at 81 M.C.C. 35.

JURISDICTION

The judgment of the district court in the *J–T Transport* case (*J–T* R. 159) was entered on August 9, 1960. Timely notices of appeal (*id.* at 180–83, 184–85) were filed and probable jurisdiction was noted on February 20, 1961 (*id.* at 186; 365 U.S. 808). The judgment of the district court in the *Reddish* case (R R. 411–12) was entered on October 19, 1960. Timely notices of appeal (*id.* at 412–15, 416–18, 418–20) were filed, probable jurisdiction was noted on April 17, 1961 (*id.* at 421; 365 U.S. 877), and the cause was set for argument immediately following the *J–T Transport* case (*R* R. 421). The jurisdiction of this Court to review these final judgments is conferred by 28 U.S.C. 1253.

STATUTE INVOLVED

The pertinent statutory provisions, the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding 301, and Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 303(a)(15), 309(b), are set forth in the Appendix, *infra*, at pp. 61–64.

QUESTIONS PRESENTED

Section 209(b) of the Interstate Commerce Act provides that the Commission, in passing upon applications for contract motor carrier permits, must consider a number of factors, including "the effect which granting the permit would have upon the services of the protesting carriers" and "the effect which denying the permit would have upon the applicant and/or its shipper." These cases present the questions:

1. Whether the Commission may consider the "adequacy of existing service" provided by protesting common carriers, or their ability and willingness to provide a proposed service, in weighing the effects on shippers of denying, and on the services of protesting carriers of granting, the permit.

2. Whether in determining the "adequacy of existing service" the Commission (a) has placed an improper burden of proof upon the applicant and supporting shippers by requiring them to establish the inadequacy of the service offered by the existing carriers, and (b) has taken an unduly narrow view of "adequacy" that fails to consider the "distinct need of each individual customer."

3. Whether the Commission may presume that loss of actual or potential traffic by protesting common carriers to the applicant for a contract carrier permit will have an adverse effect upon services which the common carriers render the public.

In addition, the *Reddish* case presents a separate question:

4. Whether the Commission's refusal to consider the ability of the applicant to render a proposed service for the supporting shippers at lower cost than that offered by the existing carriers contravenes either the command of the National Transportation Policy that the Act be so administered as to promote economical and efficient service or the statutory requirement that the Commission consider the effect on the shipper of denying the permit.

STATEMENT

These are direct appeals from final judgments by three-judge district courts setting aside orders of the Interstate Commerce Commission. In each case, the Commission denied the applicant a permit to engage in contract motor carriage. In the *J–T Transport* case (Nos. 17, 18), the United States supported the order of the Commission before the district court, but has now concluded, after further analysis of the issues, that the order was erroneous. In the *Reddish* case (Nos. 49, 53, 54), the United States admitted error (see *R* R. 15, 399) and still adheres to that position.

THE J–T TRANSPORT CASE

The administrative proceedings.—On March 14, 1957, the J–T Transport Co., Inc., filed an application to extend its present operations as an irregular-route contract carrier of airplane parts by motor vehicle to the carriage of aircraft landing gear bulkheads on behalf of Boeing Aircraft Company from their supplier in Indianapolis, Indiana to Boeing's

Wichita, Kansas, plant. Hearings on the application were held before an examiner. Boeing supported the application, but several motor common carriers appeared as protestants. The principal protesting carrier, U.S.A.C. Transport, Inc., is a highly specialized irregular-route transporter of airplane parts. U.S.A.C. made a showing of its capabilities and demonstrated that it could render a service substantially identical to that proposed by J–T Transport. (*J–T* R. 33–34, 36, 110–24.) Boeing indicated that it had not sought to secure the proposed service from U.S.A.C. because of unsatisfactory damage experience with that carrier in 1953 (*id.* at 33, 101), and Boeing's witness expressed the belief that contract carriage was more practicable for Boeing than common carriage, because a contract carrier's operations could be more readily integrated with the manufacturer's production, thereby insuring necessary reductions in transit time (*id.* at 86, 90–91, 161).

The examiner filed a report on July 18, 1957, recommending grant of the permit. (*J–T* R. 16–20.) In its order of January 31, 1958, Division 1 of the Commission adopted the examiner's findings of fact (*id.* at 24) but denied the application. It found that, since "no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers," the applicant had not established a "need" for contract service; and a "service not needed cannot be found consistent with the public interest or the national transportation policy" (*id.* at 26–27).

On petition for reconsideration, the full Commission on June 15, 1959, denied the application (*id.* at 29–53).

The Commission's report.—The Commission reviewed the background of the 1957 amendments to the Interstate Commerce Act, by which Congress amended the definition of contract carriage and specified five criteria for the Commission to take into account in passing on applications for contract carrier permits (*J–T* R. 35–44).[2] It concluded that Congress did not intend "the abandonment of our long continued practice of considering the adequacy of existing common * * * carrier service in determining whether a need has been established for a proposed contract carrier operation * * *," and that, in view of the Commission's "past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted," there is "a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before" (*id.* at 41–42).

Turning to the application before it, the Commission found that J–T Transport's proposed operations came within the new definition of contract carriage

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[2] The statute as amended is set forth in the Appendix at pp. 62–64, *infra*. The five criteria are (1) number of shippers to be served, (2) nature of the service proposed, (3) effect of a grant on protesting carriers' services, (4) effect of a denial on applicant and/or its shippers, and (5) changing character of shipper's requirements.

(*id.* at 45), and it then considered each of the five new statutory criteria (*id.* at 45–48). It found the applicant qualified in terms of the number of shippers to be served and of the nature of the service proposed; it found that the applicant would not be adversely affected by a denial of the grant nor, since "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C.," would the supporting shipper (*id.* at 45, 46–47). Finally, applying the presumption it had already announced, the Commission concluded that, "in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed * * * a grant of authority to applicant would have an adverse effect upon that protestant" (*id.* at 45–46).[3]

The court proceedings.—The present action was instituted by J–T Transport on August 21, 1959, in the Western District of Missouri (*J–T* R. 1), and the three-judge district court rendered its decision, setting aside the Commission's orders and remanding the case to the Commission for further proceedings, on August 9, 1960 (*id.* at 160–79). After reviewing the legislative background of the 1957 amendments, the court concluded that, in considering the ability and willingness of existing common carriers to handle the traffic in question—a factor which was originally proposed by the Commission for inclusion in the statute but then withdrawn and not adopted by Congress—the

[3] The fifth statutory criterion was found inapplicable (*J–T* R. 47–48).

Commission had injected a "sixth criterion, specifically rejected by Congress," and had therefore erred (*id.* at 173).

The court went on to find that the Commission had erred in imposing upon the applicant the burden of showing that existing services were inadequate (*id.* at 174). It further found that the Commission had considered the shipper's needs only in terms of "*reasonable transportation needs*" rather than in terms of the "*distinct* or *specific* need of the supporting shipper," and that this was error (*id.* at 177). Finally, it ruled that the Commission had erred in allowing the existence of willing and able common carriers to govern the decision of the case by applying a presumption that such carriers would be injured if denied the traffic in question (*id.* at 174–76). In so holding, the court especially noted that the record showed no actual adverse impact upon the "services" of U.S.A.C. by virtue of the grant and that such injury seemed unlikely since U.S.A.C. had never handled the traffic in question (*id.* at 176–77).

THE REDDISH CASE

The administrative proceedings.—Elvin L. Reddish filed an application on May 13, 1958, for a permit to carry canned goods by motor vehicle as a contract carrier from three points in Arkansas and one point in Oklahoma to various points in thirty-three states

(*R* R. 23–36).[4] At the hearing on this application he was supported by his three prospective shippers and opposed by various motor and rail common carriers (*id.* at 366, 368). According to the record, Reddish's service on behalf of his shippers was to be in the transport of canned fruits and vegetables to those wholesaler and retailer customers of the shippers ordering goods in less-than-truckload amounts (*id.* at 370–71, 390, 393). Because the low profit margin in the canned-goods business causes these customers (especially the smaller ones) to maintain low inventories (*id.* at 371, 389, 391), they require expedited deliveries in small quantities and on short notice (*id.* at 126–27, 148–49, 371). In addition, many of them will accept deliveries only at specified hours on certain days (*id.* at 128, 178, 245). The type of operation involved requires considerable integration and coordination between shipper and carrier; indeed, most of the shippers' competitors rely on unregulated private carriage (*i.e.*, trucks which they own and operate) for the shipment of their goods (*id.* at 147–48, 195,

[4] The applicant also requested authority to transport materials and supplies needed by his contracting shippers back to their plants on the return trips from outbound deliveries. This authority was denied by the Commission, and, as we understand the basis of the lower court's vacation of the order, the agency's inbound service determination is unaffected. We believe, therefore, that this issue is not involved in the case at this stage of the proceedings.

371), as did the principal supporting shipper (Steele) for the bulk of its shipments until a strike at its plants reduced its private carrier fleet (*id.* at 370–72, 389–90).

The shippers indicated that common carriage would not satisfy the great bulk of their service needs. In order to avoid hauling goods in a partly empty truck, the traffic must be carried in consolidated loads of shipments bound for various customers, frequently in scattered locations (*R* R. 116, 128–29, 190, 194); often the available common carriers cannot consolidate the separate shipments because they are not authorized to deliver to all of the points at which the shippers have customers (*id.* at 190, 194). Moreover, consolidating loads requires careful scheduling upon short notice (*id.* at 107, 128–129, 131). Because of their lack of authority, common carriers must frequently "interline" the traffic (*i.e.*, unload it and reload it on another carrier); this causes substantial delays (*id.* at 194, 198), increases the likelihood of damage to the goods (*id.* at 373) and often results in misconsignment of particular shipments (*id.* at 198–99). Furthermore, the shippers testified that because the cost of common carriage was "prohibitive" for less-than-truckload shipments, they would use private carriage for such shipments if Reddish's contract carrier application were denied (*id.* at 173; see also *id.* at 390).

The protesting motor common carriers testified generally as to their ability to furnish service to the shippers (*id.* at 375–81); they indicated that they could provide multiple pickup and delivery services to

most of the points involved by interlining and that they could provide adequate less-than-truckload service (*id.* at 382, 391–93; see also, *e.g.*, *id.* at 281–85, 289–300).

The examiner concluded that the proposed contract-carrier service "will be more responsive to shipper's transportation requirements" than would common carriage and that the grant would not have "any material adverse effect upon the operations of any other carrier" (*id.* at 382); accordingly he recommended granting the application (*id.* at 384). On review, Division 1 of the Commission, although adopting the examiner's statement of the facts as its own (*id.* at 388), denied the application (*id.* at 385–95), and a petition for reconsideration was denied by the full Commission (*id.* at 396–98).

The Commission report.—The Commission[5] found that applicant came within the new congressional definition of "contract carrier" and that it qualified in terms of the number of shippers sought to be served (*R* R. 393). As to the nature of the proposed operation, the Commission found that the service needed by the shippers "could be performed by protesting common carriers as well as by applicant" (*ibid.*). Citing its decision in the *J–T Transport* case, *supra,* the Commission summarily concluded that the services of the common carriers would therefore be adversely affected by the grant (*id.* at 394).

[5] In the Report of Division 1, which is the Commission's Report in this case.

The Commission found that, since the applicant was "a new entrant into the field of motor transportation," denial of the application would not affect him adversely (*ibid.*). With respect to the effect upon the shippers of a denial, the Commission recognized that the common carriers "may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries"; however, it concluded that, in view of the shippers' insufficiently "positive showing" that existing service would not meet their "reasonable transportation needs," they would not be adversely affected by a denial (*id.* at 394–95). The Commission also noted its view that the shippers' desire to obtain lower rates for their less-than-truckload traffic was the primary, if not sole, reason for their support of the application, but held that "[t]his is not a sufficient basis to justify a grant of authority to a new carrier" (*id.* at 395).*

The court proceedings.—The present action was instituted by Reddish on January 27, 1960, in the Western District of Arkansas (*R* R. 1). A three-judge district court rendered a decision setting aside the Commission's order and remanding the case to the Commission for further proceedings (*R* R. 398). Primarily on the basis of the *J–T Transport* decision in the Western District of Missouri, *supra*, the court concluded that, in considering the adequacy of the service proposed by existing common carriers, the

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*As in the *J–T Transport* case, the Commission found the fifth statutory criterion inapplicable (*ibid.*).

Commission had employed a criterion "which Congress deemed improper" (*id.* at 406–09). The court also found that the Commission's presumption that existing common carriers would be injured by the loss of potential traffic was overcome by the evidence of record that the shippers would use private carriage if the application were denied (*id.* at 410).

In addition, the court ruled that the record did not support the Commission's finding that shippers would not be adversely affected by a denial of the grant; it found the record clear that "the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized" (*id.* at 405–06). Again relying on the *J–T Transport* decision, the court also indicated that the Commission had used an improper test to evaluate the effect of denial upon shippers when it considered only the "reasonable" transportation needs of the shippers rather than their actual and distinct needs (*id.* at 410).

Finally, the court held that the Commission had erred in refusing to consider the lower rates available from contract carriage in determining the effect of denying the application upon the shippers (*id.* at 409). On the basis of the directive of the National Transportation Policy to promote "economical" service, the court found that "where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including

the lower rates * * * the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers" (*ibid.*).

SUMMARY OF ARGUMENT

The 1957 amendments to Section 209(b) of the Interstate Commerce Act provide that the Interstate Commerce Commission, in passing upon applications for contract carrier authorizations, is to take into account (in light of the public interest and the National Transportation Policy) a number of specified factors. Among these are "the effect which granting the permit would have upon the services of the protesting carriers" and "the effect which denying the permit would have upon the applicant and/or its shipper." These cases present a number of questions as to the standards and procedures to be employed by the Commission in applying these statutory criteria to individual applications.

I

Although the district court opinions are not altogether clear on this point, it appears that both courts may have held that the Commission is precluded from giving any consideration at all to the ability and willingness of existing common carriers to perform the service proposed by the contract carrier applicant. If this was the ruling, we submit that it was error. The adequacy of existing common carrier service must necessarily be an important factor—indeed, it will often be the most important factor—in determining contract carrier applications, for it provides the

primary basis for evaluating the effects on shippers of denying, and on the services of common carriers of granting, the proposed permit.

The legislative history of the 1957 amendments establishes no more than that the adequacy of existing service must not become an automatically conclusive factor in contract carrier cases. The failure of Congress to enact the amendments proposed by the Commission that would have made this factor conclusive stemmed largely from concern lest too heavy a burden of proof be imposed upon contract carrier applicants and entry into the field be too severely restricted. The fact that the Commission and both the common and contract carriers supported the amendments as finally passed is clear evidence that they were not intended to preclude the Commission from taking into account the ability and willingness of existing common carriers to perform the proposed services.

II

On the theory that the regulation of contract carriage is for the purpose of protecting common carriers, the Commission has approached the consideration of contract carrier applications in such a way as to make denial virtually automatic whenever it finds that one or more common carriers are willing and able to render the service. It is this approach that is at the heart of three challenges to the Commission's actions in the present cases: that it required applicants or their supporting shippers to prove the inadequacy of existing service, that it used an improper measure for determining the adequacy of existing service, and that it employed an unjustified pre-

sumption in determining the effect of granting a permit upon existing common carriers.

A. Common sense and the legislative history of the 1957 amendments clearly establish that the burden of showing the capability of existing common carriers to perform the proposed service is upon the protesting common carriers. The Commission fully recognizes the rule. It is contended, however, that the Commission improperly assigned that burden to the applicant or its supporting shippers in both of the present cases. While some of its statements in the *J–T Transport* case might suggest that it had imposed the burden on the applicant, the Commission's opinion taken as a whole indicates that it found the principal protesting common carrier willing and able to perform the proposed service on the basis of the record as a whole. In the *Reddish* case, however, the Commission's opinion does provide a substantial basis for concluding that the Commission improperly required the supporting shippers to prove that the existing common carriers had been tried and found unable to perform the distinct services on which the contract carrier application was based.

B. Section 203(a)(15) of the Act, as amended by the 1957 amendments, defines contract carriage in terms of a response to "the distinct need of each individual customer." It is contended that the Commission in these cases erroneously appraised the effect on shippers of denying the applications by limiting its inquiry to the question whether existing common carrier service was "reasonably" adequate

or was able to meet the shippers' "reasonable" needs. The Commission does not seem to have committed such an error in the *J–T Transport* case, where the record taken as a whole indicated an ability on the part of the protesting common carrier to meet the actual needs of the shipper. However, in the *Reddish* case, the Commission recognized that the common carriers would not be able fully to satisfy the transportation needs established by the shippers; it avoided weighing this deficiency against any actual effect the grant of a permit might have upon the protesting common carriers by concluding, erroneously, we submit, that the shippers must be satisfied with "reasonably" adequate service.

C. In both cases, the Commission, having found the existing common carriers willing and able to provide the service proposed by the applicant for a contract carrier permit, applied a presumption that the services of the common carriers would be adversely affected by the grant of the application; in each case, this conclusion was the primary basis for denying the application. The legislative history of the 1957 amendments clearly negates any notion either that ability and willingness of existing carriers might thus become conclusive, or that any one of the five criteria set forth in Section 209(b) might be given decisive force by means of a conclusive presumption unrelated to established facts.

This does not mean, of course, that considerable weight may not be given to the existence of able and willing common carriers and to the impact that granting a permit might have upon them, even in terms of potential traffic. However, that impact must be determined in the light of the facts of each particular

case, with the aid of such expertise as the Commission may properly draw upon, and the impact must be balanced against the consequences that would stem from failure to grant the permit. The Commission must consider such facts as, for example, that the shippers will not utilize the services of common carriers even if the contract carrier application is denied. Having weighed all of the relevant factors, the Commission may, indeed, arrive at general conclusions as to the balance it will strike in evaluating similar contract carrier applications in the future; however, these conclusions must be based on established facts relating to the motor transportation industry, not on a presumption, and the Commission must consider the circumstances in each new case to see whether the evidence upon any factor is sufficient to warrant a departure from the general rule.

III

In the *Reddish* case, there was substantial evidence to the effect that the contract carrier applicant could, by virtue of economies and efficiencies inherent in his operations, and would, offer lower rates to the supporting shippers than were available from common carriers. The Commission refused to consider this evidence in appraising the effect that denial of the contract carrier application would have upon the shippers. The district court found this to have been error, and we agree.

A. The directive of the National Transportation Policy, that the Commission recognize the "inherent advantages" of each form of transportation and that

it promote "economical and efficient service," and the requirement of Section 209(b) that the Commission consider the effect of a permit denial upon the supporting shippers, clearly indicate that the Commission must give due weight to rate advantages offered by contract carrier applicants. While it may not be bound to do so when such advantages stem from mere profit-shaving, it must plainly do so when the advantages are shown to result from efficiencies and economies inherent in the nature of the contract carrier's operations. Shippers cannot be forced to resort to separate proceedings attacking the justness and reasonableness of common carrier rates in order to obtain such advantages, nor will Commission consideration of such advantages turn the proceedings upon contract carrier applications into massive rate cases.

B. Moreover, the record in the *Reddish* case did in fact establish that the rate advantages offered by the applicant stemmed from economies and efficiencies inherent in the type of contract carriage proposed. Most significantly, evidence as to economic advantages resulting from load consolidation, elimination of interlining and lack of terminal costs would, unless rebutted, have precluded a finding (had the Commission reached the issue) that the proposed rate advantages were not the result of such inherent economies and efficiencies.

ARGUMENT

INTRODUCTION

These cases present a series of interrelated issues as to the standards to be applied by the Interstate Commerce Commission in passing upon applications

for contract carrier authorizations in the light of the amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act adopted by Congress in 1957. Both cases raise an issue as to the extent to which the Commission may consider the adequacy of existing service or the ability and willingness of existing carriers to provide the service proposed by the applicant, in complying with the statutory mandate to consider the effects on shippers of denying, and on the services of protesting carriers of granting the proposed permit. Both cases also present issues as to who has the burden of establishing the capabilities of the existing carriers, and what standards the Commission is to apply in determining the effect of denial upon shippers and of a grant upon the protesting carriers. In addition, the *Reddish* case (Nos. 49, 53, and 54) presents a separate question—whether the Commission, in determining the effect of denial of a contract carrier application upon the proposed shipper, may refuse to give any consideration to a contention that the applicant proposes to provide services at lower rates than the protesting common carriers.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), prescribes the standards the Commission is to apply in passing upon applications for contract carrier permits. It provides that a permit "shall be issued to any qualified applicant" who is "fit, willing, and able" to perform contract carrier services and to conform to the Act and Commission regulations, where the proposed operation "will be consistent with the public interest and the national transportation policy declared in this Act". By

amendment in 1957, 71 Stat. 411, there was added to this general test a provision declaring that

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers [4] and the effect which denying the permit would have upon the applicant and/or its shipper [5] and the changing character of that shipper's requirements. [Numbers added for the Court's convenience.]

In both the *J–T Transport* and *Reddish* cases the Commission found the applicants qualified to operate as contract carriers both with respect to the number of shippers to be served and the nature of the operation,[7] and to conform generally to the definition of contract carrier set out in Section 203(a)(15) of the Act, 49 U.S.C. 303(a)(15). The Commission, however, denied the applications on the ground that the available common carrier service that the protesting carriers were able and willing to provide to the proposed shippers was adequate to meet their needs. Holding that there would therefore be no adverse

[7] The Commission's brief in the *Reddish* case appears to suggest (pp. 18–21) that the Commission had found the proposed service there not properly classifiable as contract carriage. It is clear, however, that the Commission, in the passage cited in the brief, concluded only that "the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant" (*R* R. 393).

effect upon the shippers by a denial of the application but that a grant would necessarily adversely affect the services of the protesting carriers, the Commission concluded that a grant of the application would be inconsistent with the public interest and the National Transportation Policy.[8]

The district courts reversed in both cases. In both they appear to have held that the Commission, in considering whether existing common carriers were willing and able to provide the proposed service, had injected into the statutory standards for passing upon such applications an improper "sixth criterion" that had been proposed by the Commission itself at the time of the 1957 amendments to Section 209 but had subsequently been withdrawn (*J–T* R. 173; *R* R. 407–08). The courts also held that the Commission in both cases had improperly imposed upon the applicants or their supporting shippers the burden of showing the inadequacy of common carrier facilities to meet the needs of the shippers (*J–T* R. 177; *R* R. 406); that the record in each instance failed to support the Commission's conclusion that the needs of the shippers could in fact be met by existing carriers (*J–T* R. 177; *R* R. 405–06, 408) and that, to the extent the

[8] The Commission in both cases also concluded that a denial would have no adverse effect upon the contract carrier applicant, see p. 28, *infra*. The Commission also indicated (*J–T* R. 47–48; *R* R. 395) that the factor relating to changing shipper conditions comes into play only where a shipper already provided with a full line of transportation services by a contract carrier expands its operations and requires new services, or where future shipper requirements indicate that common carrier facilities will become inadequate.

Commission had based this determination upon a finding that such needs could be "reasonably" met, the Commission had applied an improper standard (*J–T* R. 176–177; *R* R. 410); and that the Commission, in determining that protesting carriers would necessarily be adversely affected by a grant of the applications, had improperly applied a conclusive presumption for which there was no support in the record (*J–T* R. 170, 176; *R* R. 410). In addition, in the *Reddish* case the court held that the Commission had erred in failing to give any consideration whatsoever to the claim that grant of the application there would provide shippers with transportation at lower rates than the protesting common carriers could or did offer (*R* R. 409).

The United States takes the position that both the courts below erred insofar as they held that the Commission is precluded from giving any consideration to the existing common carrier's ability and willingness to provide the service proposed by a contract carrier applicant. We believe that the district court in the *J–T Transport* case erred in concluding that the Commission imposed upon the applicant the burden of demonstrating the service capabilities of the common carriers, and in holding that the record failed to support the Commission's finding that the shippers' needs could be met by the protesting common carrier. We submit, however, that the Commission's decisions in both cases are invalid because, as the district courts found, the Commission reached its crucial conclusion that the existing carriers would be adversely affected by grant of the applications upon

the basis of an improper presumption unrelated to the facts of record. In our view the Commission's order in the *Reddish* case is invalid for the additional reasons that the Commission appears improperly to have imposed on the supporting shippers the burden of establishing the inadequacy of existing service, and that the Commission failed to give appropriate consideration to the needs that those shippers had demonstrated on the record, particularly their needs for transportation of less-than-truckload quantities at rates lower than the existing common carriers would offer.

I

THE ALLEGED ERROR IN THE COMMISSION'S GIVING ANY CONSIDERATION TO "ADEQUACY OF EXISTING SERVICE"

While it is not altogether clear, each of the courts below appears to have held that the Commission may not, in passing upon applications for contract carrier permits, even consider the adequacy of existing common carrier service or (what is in essence the same thing for these purposes) the ability and willingness of protesting common carriers to perform the service proposed by the applicant. If this was the ruling, it was error. We agree with the Commission that such consideration is not barred by anything in the Interstate Commerce Act, the 1957 amendments thereto, or their legislative history. On the contrary, this consideration, upon a proper record, may constitute the primary basis for evaluating the effect of a grant or denial of a contract carrier application

upon the protesting carriers and proposed shippers, respectively.

As the Commission points out in its brief in No. 17 (at p. 29), application of the governing standards set forth in amended Section 209(b) necessarily requires consideration of the adequacy of existing common carrier service. Plainly enough, the Commission cannot evaluate "[3] the effect which granting the permit would have upon the services of the protesting carriers" unless it determines whether the protesting carriers are willing and able to handle the traffic in question, for there will be no "effect" unless they are so willing and able. Similarly, in order to know "[4] the effect which denying the permit would have upon the * * * shipper," the Commission must determine the adequacy of the common carrier service that would be available to the shipper in the event of a denial. There is absolutely nothing in the wording of the statute or in the legislative background of the 1957 amendments to suggest that the Commission was to leave out of account the most important factual element in considering these two statutory criteria.

The most that the language and legislative history of the 1957 amendments establish is that the Commission cannot deny a contract carrier application solely because common carriers are willing and able to furnish the proposed service, without regard to the other statutory criteria (see pp. 40–42, *infra*). As the Commission fully explains in Point I(C) of its brief in No. 17 (at pp. 28–45), it originally proposed an amendment to section 209(b) that would have re-

quired contract carrier applicants to show "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." One of the principal reasons for the deletion of the amendment was the common recognition of the unfair, if not impossible, burden of proof that such a requirement would impose upon contract carrier applicants. Similarly, the deletion of the Commission's proposed amendment to the Section 203(a)(15) definition of a contract carrier, which would have limited such carriers to the furnishing of special or individual transportation services "not provided by common carriers," stemmed in large part from a concern that, since many common carriers are authorized to provide highly specialized services for individual shippers, its inclusion might virtually preclude any new grants or extensions of existing permits. See *Surface Transportation—Scope of Authority of I.C.C.*, Hearings before a Subcommittee of the Senate Interstate & Foreign Commerce Committee, 85th Cong., 1st Sess., 43–44, 295–96, 301–03 (hereinafter cited as "Hearings").

The 1957 amendments were indisputably the result of compromise among the competing interests that were represented in the congressional hearings. As the bill was finally passed, it had the support not only of the Commission but of both the Common and Contract Carrier Conferences of the American Trucking Association (S. Rep. No. 703, 85th Cong., 1st Sess., 6, 7; H. Rep. No. 970, 85th Cong., 1st Sess., 2; 103 Cong. Rec. 14036). It is inconceivable that if there had been any basis whatever for supposing that avail-

ability of existing common carrier service would no longer be open for consideration in contract carrier permit cases, either the Commission or the Common Carrier Conference—who entered the hearings intending to make that factor decisive—would have lent their support to these amendments. In short, there is literally nothing about this legislation—nothing in the circumstances that give rise to its enactment, nothing in the congressional background, nothing in its plain language—that yields the slightest suggestion that the Commission was henceforth to be precluded from giving due weight to the adequacy of existing common carrier service or to the willingness and ability of those carriers to provide the service proposed.

II

THE ALLEGED ERRORS IN THE COMMISSION'S APPLICATION OF THE STATUTORY CRITERIA FOR DETERMINING CONTRACT CARRIER APPLICATIONS

The difficulties that the United States finds with the Commission's decisions in these cases lie not in whether the Commission may consider the adequacy of existing common carrier service or the common carriers' ability and willingness to provide a proposed service, but in the manner in which it considered them. The Commission's position on this question is quite clear. Regulation of contract carriage, it asserts, is largely, if not entirely, based upon the need for protecting common carriers; therefore it has determined that whenever such carriers are willing and able to perform a service for which shippers have

shown a need, a contract carrier application to provide the service should be denied (*J–T* R. 38, 41–42).

Reflected in terms of its post-1957 consideration of contract carrier applications under the five tests newly set out in Section 209(b), this position means that if an applicant surmounts the first two hurdles—*i.e.*, proposes a sufficiently limited number of contracts and a service that can properly be classified as contract carriage—he will nevertheless fail if the existing common carrier service is found to be adequate or if the common carriers are willing and able to provide the proposed service. In such situations, the Commission will conclude that a denial will have no adverse effect upon the shipper whereas a grant would adversely affect the protesting carriers. The only possible qualifications to this rule would be where highly exceptional circumstances existed indicating that a denial would seriously injure the applicant contract carrier[*] or that the changing needs of the shippers warranted a departure from the norm.

We believe that this position, which makes adequacy of existing common carrier service wholly determinative in virtually every case, was of doubtful

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[*] Where, as in the *Reddish* case, the contract carrier applicant is not yet a permittee, the Commission holds that, for this reason, a denial "could not be said to affect him adversely" (*R* R. 394). Where he is an existing permittee, as in the *J–T Transport* case, the Commission appears to hold that a denial would leave him no worse off than he was before (see *J–T* R. 46). Conceivably, however, the Commission might find differently where, for example, an existing contract carrier has lost one account and, in seeking another, demonstrates that the revenues therefrom are essential to its continuing ability to serve other shippers.

validity under the original language of Section 209, and is clearly inconsistent with the action which Congress took, and refused to take, at the time of the 1957 amendments. We agree with the Commission that a major reason for bringing contract carriage under federal regulation was the necessity for protecting the common carriers upon whom smaller shippers are forced to rely. We further agree that in conformity with this objective—embodied in the general concept of the public interest and the specific statement of the National Transportation Policy against which Section 209 specifies all contract carrier applications are to be tested—the Commission was authorized, and in fact commanded, to give great weight to circumstances of record indicating that a grant would jeopardize actual or even potential common carrier service. But the achievement of this objective cannot, in our opinion, justify the mechanistic approach to the problem that has been adopted by the Commission.

There are at least three specific areas, each in issue in both the *J–T Transport* and *Reddish* cases, where the Commission's method of applying the valid underlying policy of protecting common carriers has been challenged. They involve questions as to (1) who has the burden of establishing the capacity of existing common carriers to perform the services the contract applicant proposes to provide to particular shippers, (2) what is the measure of adequacy that would justify a finding that a shipper's "distinct" needs can be met by the common carriers, and (3) in what circumstances can the Commission properly find that

the common carriers would be adversely affected by granting the application. We discuss them in turn.

A. *The burden of establishing "adequacy of existing service."*—Since the facts as to the capabilities of the common carriers lie peculiarly within their own knowledge, rather than with the contract carrier applicant or his shipper, common sense would indicate that the former should assume the burden of making a record as to their willingness and ability to provide the service for which a need has been shown. See 9 Wigmore, *Evidence,* § 2486 (3d ed. 1940. In any event, this question would appear to have been definitively settled by the action of the Congress in 1957 in deleting the proposed amendment to Section 209(b) that would have placed the burden on the applicant. See *supra,* pp. 25–26. Indeed, the Commission does not deny that the protesting common carriers have the burden of proof on this point (see Commission's brief in No. 17, pp. 43–44, 49). However, in both cases the lower courts appear to have found that the Commission *in fact* placed the burden on the applicant (see *J–T* R. 177; *R* R. 406).

In the *J–T Transport* case this conclusion appears to rest upon language in the Commission's report in which, after describing the capabilities of the protesting common carrier, U.S.A.C. Transport, Inc., the Commission states "we cannot find that existing service has been shown to be inadequate" (*J–T* R. 47).. While this statement considered by itself might raise doubt as to the Commission's intent, we agree with the Commission that the decision as a whole need not be so interpreted. For in the *J–T Trans-*

port case the protesting carrier did in fact make a detailed showing of its capabilities (see *J–T* R. 110–124). Moreover, the Commission's subsequent findings that "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C." (*J–T* R. 47), that "the very business of U.S.A.C. is the transportation of the type of traffic involved" (*ibid.*) and that "U.S.A.C. is fully able to meet the shipper's needs" (*id.* at 49), appear adequate to constitute a determination, based upon the protestants' showing, that its service could meet the shipper's needs.

In the *Reddish* case, it is somewhat difficult to determine the precise manner in which the Commission assigned the burden of establishing the capabilities of existing common carriers to provide the needed service. A careful reading of the Commission's opinion suggests that what the Commission did was to conclude, on consideration of the evidence, that the protesting carriers had an overall capability of satisfying the general kinds of needs established by the shippers:[16]

> The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. * * * [*R* R. 393.]

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[16] And it was this "finding" that apparently brought into play the presumption that the protesting carriers would, therefore, be injured by a grant of the application (*R* R. 394). See pp. 39–46, *infra*.

The Commission then went on to recognize that in some respects the protesting carriers might have some difficulty in providing service of the precise character and quality required by the shippers (*id.* at 394). It concluded, however, that since the shippers had not actually used the common carriers, they had not established that "reasonably adequate" common carrier service was unavailable:

> [T]he supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. * * * In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application. [*R* R. 394.]

Two errors seem apparent from these statements of the Commission taken in the foregoing context. The first, that the Commission, in limiting its consideration to merely "reasonably" adequate service to meet "reasonable" transportation needs, employed an improper standard for determining the distinct needs of the shipper, is discussed at pp. 33–39, *infra*. Secondly, at the very least, the Commission seems to have required the shippers to assume the burden of establishing the inability of existing common carriers to provide something better than "reasonably adequate service." We submit that this is error, for, as we shall discuss in more detail in the following section, it is "the distinct need of each individual customer"

(Section 203(a)(15)) that is at issue in a contract carrier application. The burden on the protesting carriers of establishing their own ability and willingness to satisfy the "need" in question must be in the statutory terms. The Commission aggravated the error by holding that the shippers had the burden of demonstrating the contrary by actually employing common carriers for some indefinite test period, notwithstanding the shippers' undisputed testimony that they could not afford the "prohibitive" costs of doing so (*R* R. 173).

B. *The terms in which the shippers' "needs" are to be established.*—In the *J–T Transport* decision the Commission, in enunciating the principles governing its consideration of applications for contract carrier permits opposed by common carriers, states (*J–T* R. 38) that "the decisive factor [has been] whether the available common carrier service was *reasonably* adequate to meet the transportation needs involved." (Emphasis supplied.) Similarly, as we have noted above, in the *Reddish* case the Commission articulated its view of cognizable shipper needs as "reasonable transportation needs" that could be satisfied by "reasonably adequate service" (*R* R. 394). In reversing both decisions, the courts below pointed out that Section 203(a)(15) of the Act defines contract carriage in terms of the ability of the carrier to cater to the "distinct need of each individual customer" (*J–T* R. 177; *R* R. 410), and held that to the extent the Commission finds no adverse effect upon a shipper because common carriers can provide a "reasonably adequate"

service meeting many, but not necessarily all of their proven needs, it acts improperly (*ibid.*).

The issue thus presented is no mere play on words. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95. For in most instances the determination of whether a contract carrier application should be granted or denied resolves itself into weighing the needs of the shipper against the adverse effects upon the common carriers. It may well be that in a given case the reasons for a particular shipper's wishing to use contract carriage will be so insubstantial as to be easily outweighed by almost any public interest factor pointing the other way. But the statute requires a balancing of these competing interests, and the Commission cannot read the significant element of individual shipper need out of the equation by treating merely "reasonably adequate" service as completely meeting those needs.

As the courts below held, the notion that shipper needs can be adjudged by any such generalized objective standard as that adopted by the Commission is flatly negated by the 1957 amendment to Section 203 (a)(15) by which Congress defined contract carriage in terms of "transportation services designed to meet the distinct need of each individual customer." Moreover, this Court has itself rejected similar Commission reliance on the protesting carriers' ability to provide shippers with "reasonably adequate" service. In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 90, the Court held that proposed motor carrier service could not be evaluated (as the Commis-

sion had there evaluated it) on the basis that existing service was "reasonably adequate"; rather, the "'relative or comparative adequacy' of the existing service"—*i.e.*, the relative responsiveness of the competing forms of transportation to the transportation needs actually involved—"is the significant consideration when the interests of competition are being reconciled with the policy of maintaining a sound transportation system."[11] So here, it is the "relative or comparative" responsiveness of the common and contract carriers to the distinct needs of the supporting shipper, and not the common carrier's ability to provide "reasonably adequate" service,[12] that must

[11] In the *Schaffer* case, the Court was concerned with the conflict between an application for common carrier motor transport authority and existing rail carriers, and the decision talks in terms of giving weight to the command of the National Transportation Policy that the Commission administer the Act with due regard to the "inherent advantages" of different modes of transportation. But regardless of whether common and contract motor carriage can be classified as constituting different "modes" of transportation, see p. 49, *infra*, it seems clear that the express directive that Congress wrote into Section 209(b) of the Act, that the Commission consider the effect of a denial of a grant upon the shippers, compels a similar result.

[12] The Commission argues in its brief in the *Reddish* case (p. 22, n. 9) that its use of the phrase "shipper's reasonable transportation needs" in its opinion in that case (*R* R. 394) merely reflects a proper limitation of its consideration of shipper needs to those that are not "unreasonable demands bordering on shipper whim which no regulated carrier should be expected to be in a position to meet." If a contract carrier applicant is in fact willing to meet these demands we do not believe they should be totally ignored by the Commission merely because it would be unreasonable for a common carrier to meet them in view of its other responsibilities. The spectre that such consideration would allow the shipper to control the

govern the question of the "effect which denying the permit would have upon the * * * shipper."

In the *J–T Transport* case the court appears to have justified on these grounds its holding that "the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier" (*J–T* R. 177). We agree with the Commission that this ruling does not properly reflect the Commission's Report. The Commission specifically noted the testimony of the prospective shipper as to its special needs (*J–T* R. 32–33, 34). It concluded, however, on analysis of the operations of U.S.A.C. (the protesting common carrier), in the light of the shipper's specific criticisms, that "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C." (*id.* at 47), and that "U.S,A.C. is fully able to meet the shippers' needs" (*id.* at 49). These findings, we believe, were clearly within the range of the conclusions the Commission could appropriately reach in view of the detailed record evidence as to

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granting of an application is illusory since the Commission could find such needs outweighed by any demonstrable adverse effect a grant would have on the common carriers. In any event, the Commission admits a shipper "is fully entitled to have his actual needs filled" (Commission brief in No. 53, p. 22, n. 9). Yet its decision in the *Reddish* case recognizes that the common carriers are at a disadvantage "in effecting multiple pickups and deliveries," which surely are "actual needs" rather than "shipper whim[s]."

U.S.A.C.'s operations (see Commission brief in No. 17, pp. 45–52) and the relatively limited evidence introduced by Boeing to support its contentions that U.S.A.C. could not do as satisfactory a job (*J–T* R. 33, 86, 101–104).

The situation in the *Reddish* case is quite different. Here the shippers testified at length as to the inadequacy of existing common carrier service to meet their needs in dealing with many small-order grocery retailers and wholesalers, who normally keep only a 10-day stock of canned goods on hand and therefore require prompt delivery of new orders to replenish their supply as it is exhausted (*R* R. 371, 389). They stated that interlining [13] by the common carriers was inconvenient, damaged the goods and resulted in delay (*id.* at 194, 198–99, 373); that multiple pickups and deliveries by the common carriers were difficult to arrange (*id.* at 190, 194); and that common carrier transportation was slow and the time of delivery uncertain [14]

[13] Where available common carriers are not authorized to deliver to all points at which a shipper has customers, they must "interline" with other carriers, *i.e.*, "tear the shipment down" at some intermediate point, and then reload onto the other carrier in order to deliver the goods. The shipment is thus delayed by the "teardown" and reload process itself, and by the often substantial delay before an appropriate truck, *i.e.*, one headed in the right direction and having space, appears on which to reload the goods. *R* R. 194. Tearing the shipment down and reloading also increases the likelihood of damage to the goods. See *id.* at 373.

[14] Time of delivery is important to the shippers because their customers frequently accept delivery at their loading docks at certain times of the day or on certain days of the week (*R* R. 128; see also *id.* at 178, 245 (special sales)).

(*id.* at 133, 172–173, 194). The protesting common carriers testified as to their service routes and some of them spoke generally of their ability to perform a satisfactory job (*e.g., id.* at 274–79, 287–92, 301–305, 309–312). But the examiner found that "the record indicates that the proposed service [by the contract carrier applicant Reddish] will be more responsive to shipper's transportation requirements" (*id.* at 382).

The Commission, while adopting the examiner's statement of facts as "correct in all material respects" (*id.* at 388) reached a contrary conclusion. It recognized that "protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries" (*id.* at 394). It thought, however, that the shippers, as a result of their failure to experiment with the existing common carrier facilities,[15] had "failed to show that they have been unable to obtain *reasonably* adequate service upon request" (*ibid.*, emphasis added). Thus, even apart from the Commission's failure to give consideration to the rate advantages to shippers using contract carriage (see Point III, *infra*), it seems clear that the Commission has here recognized that there are some advantages to the shippers in the proposed service but has utilized the "reasonably adequate" formula to avoid the necessary determination required

[15] An experiment that, according to testimony by the shipper's witness, would have been so prohibitively expensive that it would threaten the shipper's competitive position in the industry (*R* R. 173); see Point III, *infra*.

by Section 209(b)—namely (to paraphrase the *Schaffer* case), "whether there are benefits that [the proposed] service would provide which are not now being provided by the [protestant] carriers, whether certification of the [applicant] would be 'unduly prejudicial' to the existing carriers, and whether on balance the public interest would be better served by additional competitive service" (355 U.S. at 90).

C. *The Commission's presumption of adverse effect upon existing common carriers.*—The Commission Report in the *J–T Transport* case (*J–T* R. 42) frankly states that both before and after the 1957 amendments it has applied "a presumption that the services of existing [common] carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before." (Emphasis the Commission's.) Consequently, although there was no evidence in the record as to the effect which granting the contract carrier permit would have on U.S.A.C., the Commission stated, "It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority would have an adverse effect upon that protestant" (*J–T* R. 45–46). And in the *Reddish* case, where the examiner had found that "a grant will [not] have any material adverse effect upon the operations of any other carrier" (*R* R. 382), and the evidence showed that the shippers would use private carriage for their less-than-truckload shipments in the event the application was denied (see *R* R. 390), the Commission, in find-

ing that the protesting common carriers would be adversely affected, merely referred in the most general terms to its earlier decision in the *J–T Transport* case (*R* R. 394).

We agree with the courts below (*J–T* R. 176–177; *R* R. 410) that the Commission in so holding committed reversible error. The effect of its applying the presumption, particularly with respect to a factor (effect of a grant on existing common carriers) normally considered "decisive" (*J–T* R. 38), is to define permissible contract carriage in terms of services "not provided by common carriers" despite the elimination of such language from the Section 203(a)(15) definition of a contract carrier during congressional consideration of the 1957 amendments (see p. 26, *supra*). Moreover, the Commission position is inconsistent with the action taken by Congress in adding the requirement to Section 209(b) that the Commission give consideration to five specified factors in passing upon contract carrier applications. For the directive that the Commission weigh the record evidence bearing on these several indicia cannot be squared with its giving decisive force to one of the five on the basis of a conclusive presumption totally unrelated to the facts of record.

The requirement that the Commission consider the five factors stemmed from a proposal originally made, during the course of the hearings on the 1957 amendments, by the Contract Carrier Conference of the American Trucking Association. In offering the proposal, counsel for the conference stressed his view

that the reason the Commission had had difficulty with contract carrier applications in the past "is because they have constantly been looking for some sort of magic formula that can be applied in every case instead of recognizing that it is a question of fact, and that they, as experts, should be able to make the determination" (Hearings, pp. 295–96). He stressed that in proposing standards for consideration of contract carrier applications he was not suggesting any change in the existing standard providing for a grant to qualified applicants unless it would be inconsistent with the public interest or the National Transportation Policy (*id.* at 299). But he stated (*id.* at 299–300):

> there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out * * * the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration.

The actual language proposed by the Contract Carrier Conference (*id.* at 304) was virtually identical with that eventually adopted by the Congress, except that there was added the further command that the Commission also consider the effect of a denial upon shippers and the changing character

of their requirements. Neither the House nor Senate Report on the bill commented on the meaning or objective of the new language (see S. Rep. No. 703, 85th Cong., 1st Sess., 6; H. Rep. No. 970, 85th Cong., 1st Sess., 4). However, Senator Smathers, Chairman of the Subcommittee of the Senate Committee on Interstate and Foreign Commerce which handled the bill, inserted an explanation of the bill into the Congressional Record indicating, *inter alia*, that in adopting the new language "the Committee is proposing to give the Commission more helpful standards than are contained in the present law" (103 Cong. Rec. 14036).

The district court in the *J–T Transport* case (*J–T* R. 176), appears to have thought it significant that the 1957 amendment calls for Commission consideration of the effect of a grant upon the "services" of the protesting carriers (whereas a potential denial of the application was to be judged in terms of its effect upon "the applicant and/or its shipper" directly). But regardless of whether the Congress consciously intended to draw a distinction between the effect of a grant upon the common carriers and upon their services, Congress plainly intended the Commission's evaluation to be made on the basis of a reasoned analysis in which the agency brings to bear its expertise in the field in the light of the facts of record, rather than by some *a priori* presumption. See *Schaffer Transportation Co.* v. *United States, supra,* 355 U.S. at 91; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 70. This, of course, does not mean that the Commission, in making its determina-

tion, cannot continue to give great weight to the effect a proposed grant might have upon the services of the common carriers. And we agree with the Commission that there is no reason why consideration of the effect the grant might have upon the services of the common carriers should not take into account potential as well as existing traffic. But the requisite balancing of the conflicting interests of applicant and shipper on the one hand and common carriers on the other must be made in the light of a reasoned and fully articulated consideration of the actual circumstances disclosed by the record.

The Commission in its *J–T Transport* brief (pp. 60–62), suggests that the Commission has in fact made just such a reasoned evaluation in determining, in the light of its experience in the field, that protection of the essential common carrier services requires denial of contract carriage applications wherever existing common carriers are willing and able to provide for shipper needs. The trouble with this argument is twofold: it assumes (without disclosing the evidentiary basis for the assumption) that the services of the common carriers will in fact be impaired whenever they fail to receive traffic they are willing and able to carry, and it also assumes that any such impact necessarily outweighs the advantages to the public flowing from a grant of the application. Neither of these assumptions can withstand analysis.

Thus, as the court below pointed out in the *Reddish* case (*R* R. 406, 410), in many situations the choice before the shipper may lie between utilizing the

services of the contract carrier or going into private carriage on its own. In such situations the common carriers may be no better off as a result of a denial of the application than if it had been granted. Where, as in the *Reddish* case, the record clearly indicates this is the situation, it is difficult to see how the Commission's application of the contrary presumption to deny the application serves the National Transportation Policy, which certainly does not look toward the enhancement of the wholly unregulated private sector of the motor transport industry. This does not mean, as the Commission suggests in its brief in the *Reddish* case (pp. 22 n. 9, 26), that its decisional processes are at the mercy of the shipper's fiat. Obviously an expression of shipper intent to use private transportation if the application be denied can be tested against what it and other similarly situated shippers have done in the past as well as by an evaluation of the actual costs and service consequences of the shippers' resorting to private carriage.[16]

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[16] *American Trucking Ass'ns* v. *United States*, 364 U.S. 1, 18 to which the Commission refers (*J–T Transport* Br. 55), supports this view. There this Court rejected a contention that a shipper's expressed disinclination to use the facilities of the protestant carriers (the shipper having stated that if it could not use the services of the railroad-owned trucker it contemplated using the services of another independent motor carrier or to provide its own transportation) deprived the protestants of standing to challenge the grant to the railroad subsidiary. The decision thus suggests that the Commission would be free to evaluate the actual likelihood of potential shipper use of common carriers despite their announced rejection of the possibility.

Even in circumstances where the common carriers could expect or hope to secure the shipper's business if the application for contract authority be denied, they may well be in such a strong financial condition that the impact of a grant upon their services would be minimal or nonexistent.[17] And, in a situation like that presented in the *J–T Transport* case, where both the contract carrier applicant and the common carrier protestant are engaged in highly specialized operations for a limited number of large shippers, the maintenance of adequate common carrier services might be of much less significance than in dealing with the more general types of common carriage upon which smaller shippers must necessarily rely. All such considerations are obscured when the Commission substitutes a conclusive presumption for factual analysis.

We do not suggest that the necessity for a determination based upon a balanced evaluation of all of the statutory factors in the light of the actual circumstances of record precludes the Commission from arriving at certain general conclusions as to the manner in which it expects to determine various types of contract carrier applications. The Commission need not start from scratch in every case

[17] The Commission (*J–T Transport* Br. 62) points to certain factors which it believes indicate that U.S.A.C. might find the Boeing business valuable in improving or protecting its service capabilities. These are exactly the types of factors the Commission might have considered as part of a comparative evaluation of the actual impact of the grant on U.S.A.C. But it did not do so.

but, in our opinion, may announce the action it proposes to take in various types of situations in the absence of a positive showing indicating the propriety of a contrary result. Moreover, the Commission necessarily has broad discretion in drawing reasonable inferences from the facts of record upon such issues as the probable effect of a grant upon the services of protesting carriers. But the Commission is obligated under the Act to pass upon the various factors governing its decision under the statutory standards and in the light of the concrete situation before it rather than on the basis of a single uniform presumption that might or might not have validity in the particular case. This, we are convinced, it has not done in either of the cases here.

III

THE ALLEGED ERRORS IN THE COMMISSION'S REFUSAL TO CONSIDER RATE ADVANTAGES OF CONTRACT CARRIAGE

In the *Reddish* case the contract carrier applicant proposed to provide a less-than-truckload service to three shippers at a materially lower cost than the rates offered by the protesting common carriers for the same service.[18] The Commission noted that the shippers believed that the availability of lower rates was crucial to their business survival, *i.e.*, that they would be forced out of business if they were required to pay "prohibitive" common carrier rates (*R* R. 390), and finally concluded that shipper support for the appli-

[18] Common carrier rates are at times double or triple those of the contract carrier rates (*R* R. 193–195; see also *id.* at 83–84, 353).

cation rested entirely upon their desire to obtain lower rates (*id.* at 395). But in evaluating the effect of a denial upon the shippers and in reaching its ultimate determination to deny the application, the agency swept aside all cost considerations, holding that "[t]his is not a sufficient basis to justify a grant of authority to a new carrier" (*ibid.*). In the Commission's view, "[i]f the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under [other] appropriate provisions of the act" (*ibid.*).

The district court, noting that "Congress has declared one of the goals of our national transportation policy is to promote 'economical' service" (*R* R. 409), concluded that "lower costs in the form of rates may [not] be ignored in determining [under Section 209 (b)] the effect denying the permit would have upon the shippers" (*ibid.*). Stressing that it was not holding that 'evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers" and that "[m]ere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded" (*ibid.*), the court concluded:

> * * * where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the

> record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. [*Ibid.*]

It is the position of the United States that the opinion of the district court, rather than that of the Commission, correctly states the law in this area. In our view, both the National Transportation Policy and the specific language of Section 209(b) require the Commission to weigh cost considerations where the record indicates that the lower proposed costs of contract carrier service result from the intrinsic nature of that service rather than from the mere willingness of the applicant to accept a lower rate of return than that specified by the common carriers in their tariffs. We also agree with the district court that the record in the *Reddish* case does in fact indicate that the applicant's proposed lower rates resulted from "economies and advantages inherent in contract carrier operation" (*R* R. 409), at least to an extent requiring consideration and analysis by the Commission going far beyond the out-of-hand rejection of the issue that characterized the Commission's action here.

A. *The Commission's policy of not considering rate advantages.*—As the Commission points out in its brief in the *Reddish* case (p. 29) its policy of refusing to consider the level of rates in determining whether a motor carrier application is consistent with the public interest and the National Transportation Policy is of "long standing". In *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 89 this Court rejected this "well established" policy as applied to a motor carrier

application opposed by railroad common carriers. Holding in the context of this motor-rail competition that the "ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy [embodied in the National Transportation Policy] requires the Commission to recognize"[19] (355 U.S. at 91), the Court did not pass expressly upon the validity of the Commission's practice where the competition is between two types of motor carriage (*id.* at 92).

The *Schaffer* case is, of course, controlling here if contract carrier motor transport constitutes a different "mode" of transportation from common carrier motor transport within the meaning of the National Transportation Policy. That such is the case was argued by Reddish and the Contract Carrier Conference in the court below. We agree with the district court (*R* R. 403) that it is unnecessary to reach this question in order to decide the instant case, since the National Transportation Policy is not limited to intermodal economic advantages, nor is the language of Section 209(b), requiring consideration of the effect of a denial upon shippers, so limited.[20]

The National Transportation Policy, by which the Commission is to be guided in administering the Act, in addition to requiring the recognition and preserva-

[19] See *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

[20] In so arguing, we do not concede that the "inherent advantages" clause of the National Transportation Policy is not applicable to competition between contract and common carriers engaged in motor transport.

tion of the inherent advantages of each mode of transportation, provides for the promotion of "safe, adequate, economical, and efficient service and * * * sound economic conditions in transportation and among the several carriers" (see p. 61, *infra*). The Commission itself has recognized in its decision in the *J–T Transport* case that these provisions of the National Transportation Policy are pertinent to the consideration of contract carrier motor transport applications opposed by existing common carriers and that it may not ignore "any matter which might affect the good of the national transportation system as a whole" (*J–T* R. 43). While this statement was made in justification of the Commission's concern that due consideration be given to the importance of adequate common carrier facilities in maintaining a healthy transportation system, it is equally applicable here. For the National Transportation Policy cannot be a one-way street in which only the advantages flowing to the public from common carriage are to be considered but those stemming from contract carriage are ignored. Consequently, if either type of motor carriage enjoys inherent characteristics of economy and efficiency permitting it to operate at lower costs and rates, the policy of the *Schaffer* case becomes applicable regardless of whether separate "modes" of transportation are involved. Specifically, to the extent that the lower rates of contract carriage for the less-than-carload traffic involved in this case can fairly be

said to result from the greater inherent economy and efficiency of contract carriage as opposed to common carriage, we submit that the National Transportation Policy requires the Commission to weigh this factor before reaching its decision.

If there were any doubt about the validity of this position prior to 1957 we believe it was removed by the addition of the specific provision of Section 209(b) directing the Commission to weigh the impact on the shipper of denying a contract carrier application. Nothing in the language of Section 209(b), requiring consideration of "the effect which denying the permit would have upon the * * * shipper," suggests that Congress intended to limit such consideration to the physical nature of the services the shipper would lose as contrasted with their cost advantages. On the contrary, it seems self-evident that a shipper is adversely affected whenever the denial has the effect of making him pay the higher rather than the lower rates. As the district court suggests (*R* R. 409), where rate advantages to the shipper result from mere rate-cutting or profit-shaving, the Commission may justifiably find that such advantages to the shipper are outweighed by the effect of such practices upon the protesting carriers. But where the record indicates that actual economies and efficiencies of operation are involved (and particularly where, as here, the claim is that the shipper could not survive if he is required to transport his goods at the higher

common carrier rates), the adverse effect upon the shipper of denying the application must, we submit, be weighed under Section 209(b).

It is no answer for the Commission to say—as it also did in the *Schaffer* case (see Commission Brief in No. 20, Oct. Term, 1957, pp. 26–27)—that "[i]f the shippers believe that the rates of presently authorized [common] carriers are unjust or unreasonable they should seek relief in actions against these carriers under appropriate provisions of the act" (*R* R. 395). Although this remedy might be effective in some situations, notwithstanding the great time and expense of prosecuting such a proceeding to a conclusion, a rate action is an illusory remedy where, as in the *Reddish* case, the proceedings would involve shipments from four points of origin to hundreds of destinations in over thirty states and via some dozen carriers. Moreover, the relevant question in passing upon a contract carrier operation is not the reasonableness or unreasonableness of existing common carrier rates, which may well be reasonable and still be significantly higher than the rates that an efficiently operated contract carrier can profitably offer, see Hearings, p. 214. Nothing in either the National Transportation Policy or the express language of Section 209(b) suggests that such genuine advantages are to be ignored in considering a contract carrier application because of

the bare possibility that in some cases shippers might be able to secure relief in a rate proceeding.[21]

There remains for consideration the Commission's contention that appraisal of a contract carrier's proposal to provide lower rates would open the door to challenge of the lawfulness of the proposed rates by the protesting carriers, thus converting the application proceeding into a complex and prolonged rate proceeding (Commission's *Reddish* brief, pp. 31–32). While such considerations could not in any event justify ignoring the statutory mandate, we perceive no merit in the suggestion on its own terms. For one

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[21] The two cases (other than the *Schaffer* case) cited by the Commission in support of its contention that the courts have given approval to its policy of ignoring cost factors, are clearly not in point. *American Trucking Ass'ns* v. *United States*, 326 U.S. 77, 86 (which the Commission also cited for this proposition in its *Schaffer* brief (at pp. 27–28)), and *Railway Express Agency, Inc.* v. *United States*, 153 F. Supp. 738, 741 (S.D.N.Y.), affirmed, 355 U.S. 270, both stand only for the proposition that the Commission, in approving applications, does not have to consider allegations that the applicants have engaged in, or propose illegal tariff provisions, but may defer such consideration to other appropriate post-certification proceedings. They certainly do not hold or suggest that the Commission may ignore inherent cost advantages which the applicant has over the protestants. In fact, in the *Railway Express* case the court put aside the protestant's contention that the Commission had placed improper reliance on the applicant's lower rates, since the Commission had granted the application "on the basis of evidence showing a more efficient service, *at a lower cost* and of a type not presently offered to shippers" (153 F. Supp. at 742, emphasis supplied).

thing, it is already established that the Commission is not required to pass upon such challenges to lawfulness of proposed fares in a certificate proceeding (see note 21, p. 53, *supra*). In addition, we note that other regulatory agencies have experienced no difficulties in taking comparative rate factors into account in determining applications for new transportation authority.[22] The issue presented to the Commission is not whether the particular rates proposed by the contract carrier applicant are lawful within the meaning of Section 218 of the Interstate Commerce Act but rather whether the proposed service involves economies and efficiencies in cost resulting in rate advantages to shippers that should be weighed in the balance in determining whether the application should be granted. No unduly elaborate cost analysis is necessary (if indeed any more than a qualitative appraisal is called for) in determining whether contract carrier - common carrier rate differentials stem from such factors, particularly since comparative rather than absolute levels will be in issue. As this Court has indicated elsewhere, not every Commission inquiry into comparative rate levels need assume the complexity of a fully developed rate proceeding. See *King* v. *United States*, 344 U.S. 254, 275.

B. *The character of the rate advantages proposed here.*—The Commission asserts in its brief in the *Reddish* case (p. 35) that "there is not a scintilla of

[22] See, *e.g.*, *New York-Mexico City Nonstop Service Case*, 25 C.A.B. 323, 326-27 (1957); *New York-Chicago Service Case*, 22 C.A.B. 973, 978 (1955); *Additional Service to Puerto Rico Case*, 12 C.A.B. 430, 431-33 (1951).

evidence in the record which would establish that the proposed lower rates result from economies, advantages, or more efficient operation of Reddish's contract carrier service." If by this the Commission means that there are no quantitative analyses of the comparative costs of operation of Reddish and the common carriers, this is quite true: since Reddish was not an existing contract carrier, such an analysis (in the extremely unlikely event that the Commission would have permitted it to have been made [23]), would have been difficult, if not impossible. But the absence of such analyses does not mean that the evidence of record, considered in the light of well-established principles of transportation economics, did not compel the Commission to find, as the district court found, that the lower rates Reddish proposed here "result from economies and advantages inherent in contract carrier operation" (*R* R. 409). For the record contained more than sufficient evidence as to the contrast between the existing and proposed operations from which the Commission could properly determine that the rate differentials reflected actual cost savings.

The record shows one of the principal economies incident to contract carriage of the type proposed by

[23] As the Court observed in the *Schaffer* case (355 U.S. at 91), the Commission "has always considered rates irrelevant" in passing upon an application. See also *Southland Produce Co.*, 81 M.C.C. 625, 628 (level of rates not a factor the Commission may consider in determining whether service is in public interest, except in embargo case); *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 791; *Carl Subler Trucking, Inc.*, 77 M.C.C. 707, 713.

Reddish is that small-order shipments by several shippers to scattered customers can more frequently be transported in consolidated loads (*R* R. 107, 128, 389; see also *id.* at 190, 194). By carefully scheduling and routing truck movements to meet customer and factory requirements,[24] the shipper and contract carrier can arrange to utilize the full load capacity of the truck much more successfully than could the common carrier and his shippers.[25] The operating costs of the contract carrier would drop in proportion to this increase in his "load factor."[26]

A further economic advantage of contract carriage is the elimination of the cost of interchange with connecting carriers (so-called "interlining"), that would be involved in less-than-truckload common carriage to

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[24] This is the practice of the private shipper competitors of Reddish's supporting shipper Steele, who own their own trucks and are thus wholly integrated by ownership into the transportation of their products (*R* R. 401–02).

[25] Common carriers have schedules to maintain and other customers whom they are required to serve. Section 216(d) of the Act, 49 U.S.C. 316(d), forbids common carriers to give any shipper an undue or unreasonable preference or advantage over other shippers.

[26] "A load factor is a direct measure of the extent to which the equipment operated by a motor carrier is being utilized. It is calculated by obtaining the ratio of loaded ton-miles per route-mile to capacity ton-miles per route-mile. A low load factor generally results in * * * a low rate of return. * * * [C]ommon carriers operating on regular schedules may have lower load factors than carriers which conduct nonscheduled operations." Hudson & Constantin, *Motor Transportation* 168 (1958); see Hearings, p. 27 (statement of ICC Chairman Clarke). In other regulatory fields, see, *e.g.*, *National Coal Ass'n* v. *Federal Power Commission*, 247 F. 2d 86 (C.A.D.C.); *New York-San Francisco Nonstop Service Case*, CAB Order E–14412, pp. 12, 14 (Sept. 2, 1959).

many, if not most, of the customers of Reddish's supporting shipper Steele (see note 13, *supra*, p. 37) (*R* R. 373; see also *id.* at 194). Use of consolidated load shipments over a prearranged route which the contract carrier could use but which could not be served by a single common carrier eliminates the necessity for the unloading from one carrier, storing the shipments, and reloading them onto another carrier. Moreover, contract carriage operations such as those proposed by Reddish eliminate any need for terminal facilities, whether for pickup and consolidation of loads or for interlining. Thus, contrary to the statement in the Commission's *Reddish* brief at p. 35, n. 19, Reddish has no terminals or terminal costs [27]—unlike the protestant carriers most of which, as the Commission points out (*Reddish* brief, p. 35, no. 19), have to bear the expenses of more than one terminal.

Because of these and other intrinsic differences [28]

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[27] See *R* R. 31, 55; *1960 Annual Rep. of E. L. Reddish*, ICC Docket No. 117,391 (Motor Carrier Annual Rep. Form B, Class II Motor Carriers of Property), p. 31.

[28] According to a leading transportation expert,

"There are certain differences in operations which are reflected in operating costs between contract carriers and common carriers. Contract carriers usually have no terminal facilities for platform handling of freight because they make a contract only for volume freight—which means, in effect, truckload lots. They go to the shipper's plants, load the freight, and take it directly to the consignees; and, therefore, they have no need for terminal facilities for freight handling. * * * The average revenue per ton-mile of contract carriers is consistently below that of common carriers because of differences in services and costs."

Taff, *Commercial Motor Transportation* 110 (rev. ed.); accord, Landon, *Transportation* 233–234.

between the costs of common and contract carriage, which the Commission itself has frequently recognized,[29] the agency could not (as in fact it did not) find on the record here that the rate differentials that the shippers deemed so significant as to foreclose resort to common carriage were unrelated to the inherent economies and efficiencies of contract as contrasted with common carriage. Of course, on remand and in the light of an adequate new record, the Commission may conclude that Reddish's apparent cost advantages are illusory,[30] and it has broad discretion in evaluating the significance of any cost advantages. But where, as here, all of the circumstances of record

[29] See, *e.g.*, Hearings, p. 23 (testimony of ICC Chairman Clarke); *Contract Minimum Charges from and to Baltimore, Md.*, 32 M.C.C. 273, 283 (1942); *New England Motor Rate Bur., Inc.* v. *Lewers*, 30 M.C.C. 651, 663–64 (1941). Cf. *Roofing from Elizabeth, N.J., to Norwood, Mass.*, 51 M.C.C. 258, 261 (1950); *Contracts of Contract Carriers*, 1 M.C.C. 628, 630 (1937).

[30] In such a reconsideration the factors mentioned at pages 35–36 of the Commission's *Reddish* brief might well be relevant. But so might be the evidence of Reddish's successful operation at the lower rates under the temporary authority he has enjoyed. According to Reddish's annual reports, which he is required to file with the Commission under 49 U.S.C. 320, 49 C.F.R. 205.1a, 205.13, he had been operating well in the black with a very favorable "operating ratio" of expenses to revenues. See *1960 Annual Rep. of E. L. Reddish*, I.C.C. Docket No. 117, 391 (Motor Carrier Ann. Rep. Form B Class II Motor Carriers of Property), at 30; *June 30, 1961, Quarterly Rep. Revenues, Expenses, and Statistics*, ICC Docket No. 117,391 (Form QFR-II), at 1; March 31, 1961, *Quarterly Rep. Revenues, Expenses, and Statistics*, ICC Docket No. 117,391 (Form QFR-II), at 1. Copies of these reports are lodged with the Clerk of this Court.

indicate that there were, in fact, substantial cost savings in the type of contract carriage proposed by Reddish, which could properly be reflected in rates to the shippers, the Commission may not refuse to give any consideration to the claim.

CONCLUSION

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act plainly require the Commission, when it passes upon applications for contract motor carrier permits, to weigh and carefully balance against one another each of the several factors specifically enunciated in Section 209(b), and fully to articulate its reasoning in its findings. The amendments seem clearly to contemplate, moreover, that all relevant evidence will be considered in appraising these factors and that the burden of making a record on each of them lies with the party best able to produce the evidence. Finally, the amendment to Section 209(b) requires that the Commission consider the shippers' needs on which a contract carrier application is based in terms of their own distinct and specialized character.

Within this framework, we think it entirely proper for the Commission to consider the willingness and ability of existing common carriers to provide the service proposed by the applicant; and, to the extent the courts below ruled to the contrary, we think they erred. With respect to the contention that the Commission improperly imposed upon the applicants the burden of establishing the inability of existing common carriers to meet the shipper needs at issue, we do

not believe the Commission committed this error in the *J–T Transport* case; in the *Reddish* case, the Commission's action on this point is not altogether clear, related as it is to the Commission's plain error in evaluating shipper needs in general terms of "reasonableness" rather than in terms of their own distinct character. We believe that in both cases, the Commission erred in reaching the conclusion that the services of protesting common carriers would be adversely affected by the grant of an application on the basis of a presumption that any loss of even potential traffic would have a harmful effect upon protestants' services. Finally, we think the Commission erred in refusing, in the *Reddish* case, to consider rate advantages offered by the contract carrier applicant.

Accordingly, the United States respectfully urges this Court to vacate the judgments of the district courts and to direct the entry of judgments setting aside the orders of the Commission in these cases and remanding them to the Commission for further proceedings consistent with the principles set forth above.

Respectfully submitted.

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APPENDIX

TEXT OF STATUTE INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding 1, 301, 901, and 1001:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 303(a)(15):

SEC. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 309(b):

SEC. 209.

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent

authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided,* That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within

the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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Nos. 17 and 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*.

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*,

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*.

On Appeals from the United States District Court for the Western District of Missouri—Western Division

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BRIEF FOR CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.

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---

BRIEF FOR CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.

OPINIONS BELOW

The opinion of the District Court (R. 160) is reported at 185 F. Supp. 838. The decision of Division 1 of the Interstate Commerce Commission and that of the entire Commission appear at 74 M.C.C. 324 and 79 M.C.C. 695, respectively (R. 22, 28).

JURISDICTION

This is an appeal from the judgment of the District Court entered August 9, 1960 (R. 159). The Interstate Commerce Commission filed its notice of appeal on October 6, 1960 (R. 180) and other appellants filed notice of appeal on October 7, 1960 (R. 184). Probable jurisdiction was noted February 20, 1961 (R. 186). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

This appeal involves the construction of sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended August 22, 1957, 49 U.S.C. 303(a)(15) and 309(b), 71 stat. 411. These statutory provisions as formerly written and as amended are set forth in the Appendix hereto.

STATEMENT OF THE CASE

No separate statement by this appellee is deemed necessary. We will, therefore rely upon the statement of the case made by appellee J-T Transport Company, Inc., and the facts which it will set forth.

QUESTIONS PRESENTED

1. Whether, under the 1957 amendments to section 203(a)(15) and 209(b) of the Interstate Commerce Act, the Commission may, in passing upon applications for contract carrier permits, base its determination on the willingness and ability of common carriers to render the proposed service.

2. Whether the specific criteria set forth in section 209(b) of the Act represent a change in the standards for determining consistency with the public interest and the national transportation policy and whether the Com-

mission improperly interpreted and applied these criteria.

3. Whether the District Court erred in its interpretation of the Commission's findings and its application of section 209(b).

ARGUMENT

I. IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT UNDER SECTION 209(b) OF THE INTERSTATE COMMERCE ACT THE WILLINGNESS AND ABILITY OF COMMON CARRIERS IS NOT A RELEVANT CONSIDERATION.

While it is the language of a statute that must be interpreted, resort to extrinsic aids is permissable in determining its meaning. In this proceeding it is believed that the legislative history of the amendments involved, including developments which led to their enactment,[1] cannot be divorced from the language of the statute. It is the key to a better understanding of the significance and meaning of the language employed by Congress.

Prior to the amendments of 1957 a contract carrier was defined by section 203(b)(15) of the Interstate Commerce Act as "any person which under individual contracts or agreements engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." 54 Stat. 920. Section 209(b) of the Act authorized the issuance of a permit to a contract carrier where the proposed operation was consistent with the public interest and the national transportation policy. A proviso to the

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[1] Legislative history in its broadest sense includes (1) the events leading up to the introduction of the bill out of which the statute under consideration developed, (2) the consideration of the original bill from the time of its introduction until its final enactment as the present statute, and (3) the history of the statute since its enactment. 2 Sutherland, Statutes and Statutory Constructions 5001 (3d ed. Horack, 1943).

section stated "That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit . . . as the development of the business and the demands of the public may require." 49 Stat. 552. Thus, the only statutory requirement to qualify as a contract carrier was that the transportation be performed under individual or special contracts and the Commission had no authority over the number of contracts which the carrier could enter into. A contract carrier, once having obtained a permit, could, if it chose, solicit all available traffic within the scope of its authority, even though the authority might have been granted originally on the basis of the support of a single shipper. This latitude unquestionably affected the Commission's regulatory policies and perhaps more than any other factor led to the Commission's desire for new legislation.

Under both common law [2] and the Interstate Commerce Act, contract carriers have acted as a substitute for private carriage. It is believed that a substantial majority of contract carriers have always filled this role. Prior to the 1957 amendments, however, there was a wide range in the size and activities of contract carriers.[3] Some of the larger carriers with extensive authority handled traffic for any shipper who was willing to sign a contract. The number of contracting shippers served by some carriers seemed to indicate a virtual holding out of service to the general public. Where this occurred, these operations became more competitive with those of common car-

[2] Under common law such carriers were generally referred to as private carriers for hire.

[3] With the exception of certain highly specialized fields, *e.g.* armored carriers, this is no longer true. Contract carriers which did not meet the new definition have been issued certificates as common carriers pursuant to the provisions of section 212 (c) of the Interstate Commerce Act, 49 U.S.C. 312 (c).

riers. The Commission believed that the preservation of an adequate common carrier system required greater control of non-selective contract carriers. Lacking the power to limit the service of contract carriers to specific shippers, or to place a ceiling on the number of contracting shippers which could be served, the Commission devised other methods.

The first of these was the application of a public convenience and necessity standard to contract carrier applications. A notable articulation of this standard is found in *William Heim Cartage Co. Ext.—Indianapolis*, 20 M.C.C. 329, 331-332, where the following language appears:

> "Where a permit is sought to engage in the transportation of property, the burden is upon applicant to show that facilities of existing carriers serving the territory in question are inadequate, or that they are not rendering a type or character of service which satisfies *the public need and convenience, and that the proposed service would tend to correct or substantially improve that condition.*" (Emphasis added)

The second method employed by the Commission was the so-called specialization test. This test, derived from the language of section 203(a)(15), held that the legitimate purpose of contract carriers was to furnish a specialized and individual service required by the peculiar needs of a particular shipper and which a common carrier, because of its obligations to the general public, could not well undertake to supply. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 498. Changes in the motor carrier industry required further elaboration of the specialization test.[4] Eventually, common carriers began to

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[4] In *Craig Contract Carrier Application*, 31 M.C.C. 705, 712 it was stated:

> "The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment

provide many services which had once been considered specialized, and in attempting to resolve the difficulties of applying the test, the Commission turned to the number of shippers served as a controlling factor. *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 38. However, in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 76 S. Ct. 461 (1956), this Court considered the case of a contract carrier who by active solicitation had secured 69 contracts from 1951 to 1954, and concluded that if specialization was to be read into the statute, it was satisfied under the facts of the case. The Court also held that a contract carrier was free to aggressively search for new business within the limits of his license.

As a result of this decision the Commission recommended to Congress that both sections 203(a) (15) and 209(b) of the Act be amended so as to clarify the distinction between common and contract carriers and provide for more control over the latter. 70th Annual Report of the Interstate Commerce Commission, November 1, 1956, pp. 162-164. To implement these recommendations, the Commission initiated the introduction in Congress of two identical bills, H.R. 5123, and S. 1384, which proposed to redefine contract carriage as follows:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one

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especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, or the supplying of related nontransportation services such as assembling, placing, or servicing of machinery. Or it may consist of nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited number of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization."

> person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.*" (Emphasis added.)

They also provided that contract carriers who did not meet the amended definition would be issued certificates as common carriers. Section 209(b) would be amended to provide that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," and that the Commission could impose in such permit limitations as to the person or persons and the number or class thereof who could be served.

Some of these proposals generated sharp opposition, which was expressed in hearings before the Senate. *Surface Transportation—Scope of Authority—I.C.C., Hearings before a Subcommittee of the Senate Interstate and Foreign Commerce Committee*, 85th Cong., 1st Sess. (1957). The Contract Carrier Conference and certain shippers using contract carrier service were opposed to the language of the bills as originally introduced. There was also opposition from other sources, including other government departments.

The Deputy Attorney General of the United States, dispatched a letter to Senator Warren G. Magnuson in which he stated (*Hearings, supra*, p. 11).

> "The bill would amend section 203(a)(15) of the act by changing the definition of 'contract carrier' to mean any person who engages in transportation by motor vehicle of passengers or property in interstate commerce for compensation (with the exception of common carriers by motor vehicle and those engaged in motor vehicle transportation for hire as an express company) 'under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.'

"We are opposed to enactment of that part of the definition which reads, 'and not provided by common carriers.' This quoted limitation is rather vague and it could lead to the contention by common carriers that they provide contract carrier services. Such an interpretation might unduly limit the number and availability of contract carriers. Many contract carriers are small-business men who would not be able to compete on a common-carrier basis.

"The bill would also amend section 209(b) of the Act, which sets forth the procedure and criteria to be observed in granting contract carrier permits, by adding a new criterion to the effect that the Commission must find 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.'

"The Department considers this proposed amendment unduly restrictive of the ability of applicants (particularly small-business men) to enter the contract carriage field, and is therefore opposed to its enactment."

The Commission's proposals were also opposed in part by the Department of Commerce. In a statement by Louis S. Rothschild, Under Secretary for Transportation, Department of Commerce, the following colloquy occurred at pages 200-201, and 202-203 of the *Hearings, supra:*

"Mr. Rothschild. . . . The bill would also give the Commission specific authority to deny an application for a permit where it is not shown that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown by the applicant. The bill would further authorize the Commission to incorporate in permits such terms, conditions, and limitations respecting the person or persons or the number of the classes of persons for which the contract carrier may perform transportation as may be necessary to assure that the permit holder's business is that of a contract carrier and within the scope of the permit.

"Senator Schoeppel. I would like to ask a question right there: Supposing you had a common carrier

serving certain territory but wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonably adequate and prompt service?

"MR. ROTHSCHILD. Well, later in my statement, Senator Schoeppel, we say that we don't quite believe that the rules should be as stringent as proposed by the ICC and that it should not be necessary to make all of these showings in order for a person to get a contract carrier." (sic)

• • •

"MR. ROTHSCHILD. As we read the proposal of the Interstate Commerce Commission, and then the amended position which they took in Commissioner Clark's statement yesterday, we believe that what they are currently proposing is that in the definition of a contract carrier by motor vehicle, the existence or nonexistence of common carrier motor service should be included, but when it comes to their own procedures as to how they operate under this, they retain for themselves the right to cast that qualification out.

"We think, in order to be consistent, it ought to be out both places.

"SENATOR SMATHERS. In other words, as the Senator from Kansas brought up, whether or not there is the availability of a common carrier service should not be a point in consideration?

"MR. ROTHSCHILD. They should not be able to deny the application of a common carrier[5] simply because someone claims that there is common carrier service there." (sic)

As a result of opposition to these provisions, the Commission agreed to delete the "unwilling and unable qualifications" from section 209(b). *Hearings, supra*, pp. 21-22. It did not suggest any further change in the proposed redefinition of contract carriage to remove the phrase "and not provided by common carriers". The retention of this

[5] Mr. Rothschild obviously meant to say "contract" carrier.

qualification would have had the same practical effect as the amendment originally proposed to section 209(b).

Neither S. 1384 nor H.R. 5123 were reported out of committee as introduced. In the Senate S. 1384 was drastically amended and in the House an entirely new bill was drafted (H.R. 8825). The House and Senate bills as reported and enacted were virtually identical and had the following common characteristics.

(1) The phrase "and not provided by common carriers" was eliminated from the definition of contract carriage in section 203(a)(15);

(2) The phrase "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" was eliminated from section 209(b);

(3) Both bills set up *identical* and *specific* criteria which the Commission was directed to consider in determining whether issuance of a permit would be consistent with the public interest and the national transportation policy declared in the Act.

Specifically rejected was the original proposal in section 209(b) that a permit would be granted only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." Also specifically rejected was the qualification in the definition of contract carriers in section 203(a)(15), "and not provided by common carriers."

The Senate Committee on Interstate and Foreign Commerce in Sen. Rep. No. 703, 85th Cong., 1st Sess. (1957), explained the changes in S. 1384 as follows (p. 3):

> "Undoubtedly the bill would supply a more positive statutory guide to the Commission than that existing today, and would make readily possible clearer distinctions than now exist as between motor common and contract carriers. *The committee is of the opinion, however, that as originally introduced, S. 1384*

would be unduly restrictive on contract carriage. Accordingly, the committee recommends a number of amendments to the bill." (Emphasis added.)

The Committee further noted (pp. 5-6):

"Insofar as language is concerned, there can be no doubt that some of the parties at first entertained rather sharply divergent views as to the wording Congress might wisely and fairly adopt to express its own considered judgment. That all parties or groups affected by the bill are earnestly concerned with the problems giving rise to its introduction is evidenced by the variety and range of interests appearing and testifying, and by the thoughtfulness of their presentation.

"An apparent desire to obtain constructive legislation has motivated the most active parties and groups to confer, since the hearings, to arrive at language acceptable to them, and to communicate to the subcommittee through their spokesmen their views and their proposed language. The language thus arrived at has been submitted also to the Interstate Commerce Commission, and we have been officially notified of the Commission's approval thereof. It appears to your committee that the major defects in the present statute would be corrected by the new language, and the major objectives of S. 1384, as introduced, would be achieved without unduly restricting contract carriage."

Further light is shed on the Committee changes, by Senator Smathers, Chairman of the Subcommittee which conducted hearings on the bill. In explaining S. 1384 on the floor of the Senate, he stated, 103 Cong. Rec. 14035-36 (1957):

"S. 1384, as introduced, generated sharp controversy among the carriers affected and appearing before your committee, but fortunately the bill has now been rewritten in such manner as to have the support of practically all affected interests. As it appears here today, it has not only the unanimous ap-

proval of the Committee on Interstate and Foreign Commerce, but also the full endorsement of the Interstate Commerce Commission and all types of regulated highway freight transportation as well as the railroads.

• • •

"This section (209(b)) is also amended by adding a new sentence providing that hereafter the Commission, in passing upon new permits, shall consider the number of shippers to be served, the nature of the service proposed, the effect which granting the permit would have upon protesting carriers and the effect which denying it would have upon the applicant and its shipper. In this *the Committee is proposing to give the Commission more helpful standards than are contained in the present law.* (Emphasis added.)

"The Commission came to us with a bill designed to solve the problem. The language of that bill was unacceptable to certain of the parties especially the contract carriers. Those contract carriers, however, support the bill as now drafted . . . The new bill, while not as drastic as the Interstate Commerce Commission's proposals, achieves many of the purposes sought to be achieved by the Commission in its bill."

No contention is made that the purpose or effect of the 1957 amendments was to enhance the position of contract carriers at the expense of common carriers, nor is it admitted that the purpose or effect of the amendments was to prejudice contract carriers for the benefit of common carriers. The purpose and effect was (1) to draw a clearer line of distinction between contract and common carriers; (2) to give the Commission authority to limit the number of persons which a contract carrier could serve; and (3) to provide specific criteria to be considered in deciding whether or not a proposed operation is consistent with the public interest and the national transportation policy. The amendments represent a compromise of interests. To many, the second purpose above was paramount. The Commission sought this power as a result of the decision

in *United States* v. *Contract Steel Carriers, supra.* In referring to features of the original bills which were objectionable to some, the spokesman for the Common Carrier Conference—Irregular Route, stated, *Hearings, supra,* p. 345.

> "We would yield these things to gain the main objectives, sir, and the main objective, to our point of view, is that the Commission have the unequivocal power to limit the number of contracts . . ."

The Contract Carrier Conference agreed that the Commission should have this power, but sought more definite criteria for determining consistency with the public interest and the national transportation policy, in order that, the Commission could not deny a contract carrier application on the basis of adequacy of common carrier service.

Appellants point to certain language of the General Counsel of the Contract Carrier Conference at pp. 299-300 of *Hearings, supra* as indicating that the Conference sought no change in the basic standard governing applications for contract carrier permits.[6] What was meant, and what any fair reading of the statement indicates, is that no change was sought in the statutory language "consistent with the public interest and the national transportation policy." It is also clear that while the Conference believed that the Commission should consider the effect on services of common carriers of granting the authority, it should also consider the effect which a denial would have on the contract carrier and its supporting shipper in an effort to balance the public interest. It was believed that if the Commission could limit the number of contracts of a carrier, different considerations would be appropriate in determining consistency with public interest and the national transportation policy. In fact, the amend-

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[6] Commission's main brief, pp. 38-39.

ments as a whole closely parallel proposals which the Conference had previously and unsuccessively made to the Commission in *Ex Parte MC-46* (unreported) as recommended legislation.

Both the language and legislative history of the amendments to section 209(b) preclude the Commission from requiring a contract carrier, in order to secure a permit, to show that common carriers are unable or unwilling to perform the proposed service. This language was specifically stricken. Further, we do not believe the language was omitted solely because it required an impossible burden of proof. If Congress had intended to sanction the test at all it could very well have done so by requiring in section 203(a)(15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in section 209(b) "that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown." Congress did neither. Instead it chose to protect existing carriers by directing the Commission to consider the effect which the granting of the permit would have upon the *services of protesting carriers.* Accordingly, we do not believe that the willingness or ability of a common carrier to render the proposed service is a relevant consideration. By employing this test the Commission has interjected into the statute a sixth test specifically rejected by Congress.[7]

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[7] Little significance can be attached to the amendments to Part IV of the Act, 49 U.S.C. 1001-1002. (Commission's main brief pp. 40-42) These provisions are entirely different for there is no parallel in the history of their administration. A freight forwarder is "any person which (otherwise than as a carrier subject to part I, II, or III of this Act) *holds itself out to the general public as a common carrier* to transport or provide transportation of property . . . " 49 U.S.C. 1002 (Emphasis added). In practice a freight forwarder is generally an assembler of freight and uses the transportation facilities of others. Neither by definition or practice is a freight forwarder comparable to a contract carrier. The legislative history of amendments to a different section of the

The Court Below in dicussing this issue said:

> "Defendants suggest that the specific criteria enumerated in the statute are not exclusive, but are only guides to be considered 'among other things' in the context of the public interest and the national transportation policy. Of course the ultimate determination is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy. In making this determination, however, the Commission is directed specifically to consider five definite criteria. When the Commission injects a sixth criterion, specifically rejected by Congress, it clearly has erred."

II. THE AMENDMENTS TO SECTIONS 203(a)(15) AND 209(b) SET FORTH SPECIFIC CRITERIA WHICH ARE CONTROLLING IN DETERMINING WHETHER OR NOT THE ISSUANCE OF A CONTRACT CARRIER PERMIT WOULD BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY.

A. There Is No Contemporary Evidence That the Motor Carrier Act of 1935 Was Intended to Promote or Protect Common Carriers and the 1957 Amendments Provide the Basis for a Fair and Impartial Regulation of Contract Carriers.

In an effort to negate Congressional rejection of the willingness and ability test, the Commission contends that the test is nevertheless inherent in section 209(b) in that the language contemplates a consideration of the adequacy of existing service, particularly with respect to the effect on the supporting shipper. In support of its position the Commission also relies on what it believes to be the underlying purpose of the Motor Carrier Act of 1935 and on its own regulatory policies.

Act, involving another type of carriage and dissimilar considerations, has no bearing on the legislative history of the amendments to section 203 (a) (15) and 209 (b). Moreover, some of the comments of the Senate Committee quoted in the Commission's brief strongly suggest that the language was supplied by the Commission itself. Also it is doubtful if the Committee could otherwise have been aware of the details of the *Lifschultz* case.

It would appear that the question here is not so much the purpose of the Motor Carrier Act of 1935 but that of the 1957 amendments thereto. In any event, there is little support for the Commission's views, other than those expressed by Commissioner Joseph B. Eastman. Section 202(a) of the Motor Carrier Act of 1935 provided in part, 49 Stat. 543:

> "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service *by motor carriers* . . . (Emphasis added).

Nowhere in this section is there any indication that the policy of Congress was to promote or protect adequate common carrier service as distinguished from other forms of motor carriage.

Nor is there any implication to the contrary in the legislative history. Although there had been various bills before Congress on the subject of motor carrier regulation, S.1629, introduced in the first session of the 74th Congress, provided the nucleus of the original Act. It was reported out of Committee, with amendments, accompanied by Sen. Rep. No. 482, 74th Cong., 1st Sess. (1935); debated in the Senate, 79 Cong. Rec. 5649-5735 (1935) and passed by the Senate on April 16, 1935. It was then referred to the House Committee on Interstate and Foreign Commerce; reported, with amendments, accompanied by H. R. Rep. No. 1645, 74th Cong., 1st Sess. (1935); and debated and passed with amendments on July 31, 1935, 79 Cong. Rec. 12196-12237 (1935). The House amendments were approved by the Senate. There is no statement or implication in the reports or debates that the purpose of the legislation was to promote or protect adequate common carrier service. The real purpose of the Act was to bring motor carriers under Federal

regulation in order to stabilize transportation conditions in general.[8]

Little weight can be attached to State statutes whether or not in some of them protection of the common carrier was recited as the purpose of regulating the contract carrier.[9] In the Federal statute Congress neither expressed nor intimated a similar policy. The source of language in later reports of Congressional committees cannot be determined, but such opinions are not controlling as to the purpose and intent of the 74th Congress in enacting the Motor Carrier Act of 1935. In fact, the Commission's whole position seems to be at variance with the National

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[8] See Sen. Rep. No. 482 *supra*, in particular the following language at pp. 2-3:

> "Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardize the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers, or the carriers themselves. The competitive struggle is to a large extent unequal and unfair, inasmuch as the railroads are comprehensively regulated, the water carriers are regulated in lesser degree, and the interstate motor carriers are scarcely regulated at all.

[9] See the Commission's main brief pp. 17-19 and language quoted therein from *Contracts of Contract Carriers*, 1 M.C.C. 628. In this connection the only significance of *Stephenson* v. *Binford*, 287 U.S. 251, 53 S. Ct. 251 (1932) is that it upheld the power of a State to regulate private contract carriers as such, where there was no attempt to treat them as common carriers. Some State statutes have been found to be unconstitutional as applied. *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570, 45 S. Ct. 191 (1925); *Frost v. Railroad Commission*, 271 U.S. 583, 46 S. Ct. 605 (1926), *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582 (1931).

Transportation Policy [10] which provides for fair and impartial regulation of all modes of transportation and indicates that the purpose of regulation is "all to the end" of furthering a national transportation system adequate "to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

In any event the District Court correctly found that the statute now contemplates . . . "two forms of motor carrier service entitled to *equal recognition*, and that the interests of each must receive a *fair consideration*. (Emphasis added.) (R. 179). In this connection it is less important whether a contract carrier is a separate mode of transportation or a sub-division of a mode, than that contract carriers receive fair and impartial regulation under the Act. The 1957 amendments provide specific criteria for determining whether or not to issue a permit. Promotion or protection of common carriers is not one of the criteria; however, the public interest in common-carrier service is protected by the criteria that the effect of granting the authority on the services of common carriers is to be considered. This the Court below recognized (R. 174).

B. The Application of an Adequacy of Existing Service Test to Contract Carrier Applications Has Not Been a Consistent Practice.

It is also said that the Commission has consistently treated the adequacy of existing service as a crucial factor in passing upon applications for contract carrier authority. Although there are many cases to this effect, the practice has not been consistent. Actually, a number of elements have entered into the disposition of contract carrier applications. The adequacy of existing service test is more appropriate to a public convenience and necessity standard to insure against an overabundance of public transportation, as opposed to contract carriers who do

[10] 54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901, and 1001.

not serve the general public. In the earlier days of motor carrier regulation, the Commission appeared to recognize this, for a distinction was drawn between public convenience and necessity and consistency with the public interest indicating that the latter required a lesser showing. In such cases the Commission did not speak in terms of adequacy of existing service. In *Bassetti & Lawson Contract Carrier Application*, 1 M.C.C. 187, 189 it was stated:

> "The language of the statute makes it quite clear, we think, that the requirements for the issuance of a permit are not as exacting as those governing the issuance of a certificate. In the case of the latter, it is necessary to find that the present or future public convenience and necessity require the proposed service, whereas in the case of the former it is necessary to find only that it is consistent with the public interest and with the policy declared in section 202(a). Where an applicant proposed to operate as a common carrier the statute requires, among other things, consideration of the extent to which the territory is at present served, the need for additional common-carrier service within the territory, and the facilities which the applicant can provide to supply a common-carrier service to all shippers. Less is demanded in the case of a contract carrier."

A further illustration, is the case of *Sproul Contract Carrier Application*, 1 M.C.C. 465, 467, where protestants contended that applicant had failed to prove that the proposed operation would be consistent with the public interest; and that "public interest" was, in contemplation of the Act, synonymous with "public convenience and necessity," that the latter term meant, in substance, a strong, urgent, public need; and that without such evidence the application must be denied. The Commission rejected these contentions as unsound in granting a contract carrier application. In *Howard W. Juett Contract Carrier Applications*, 1 M.C.C. 268, 270, it was stated:

> "The evidence submitted by protestants is persuasive that the rail lines maintain adequate and efficient

service on expedited schedules both for the transportation of citrus fruit from Florida to Cincinnati and of oleomargarine in the opposite direction. The evidence in behalf of applicant is equally persuasive that there is a demand for the proposed service, and that, unless the application be granted, the corporation will continue to operate its motor vehicles, for transportation of the oleomargarine."

Thus, although the evidence was said to be equally persuasive on both sides, the application was granted.

In *T. J. Broom Contract Carrier Application,* 1 M.C.C. 425, 426, the Commission said:

"Apparently it is the theory of protestants that it is incumbent upon applicant to show that the public convenience and necessity require that he be authorized to operate as a contract carrier. They have failed to show any real damage which would accrue either to competing carriers or the public generally by reason of the granting of the authorization sought herein. On the other hand, applicant has shown that his transportation services are adequate for the purposes of the shipper with whom he contracts, and that such services, by reason of applicant's location at Woodbury, are preferable to those of other carriers available for the particular purpose of this shipper."

Following this, the Commission declared in *Jason W. House Contract Carrier Application,* 1 M.C.C. 725, 735:

"We may not presume that, because applicants may compete with motor carriers entitled to rights under the 'grandfather' clause, the interests of the competing motor carriers will be adversely affected to such extent that applicants' operations will be inconsistent with the public interest and the policy of Congress declared in section 202(a). The mere showing that such competition exists is not enough. The alleged adverse effect must be proved."

In *Motor Convoy, Inc., Contract Carrier Application*, 2 M.C.C. 197, 202, the Commission made the following statement:

> "While it appears that there is *adequate* common carrier service between Gadsden and Atlanta, Cartersville, Rockmart and Cedartown, it is also apparent that applicant's service, by reason of the special handling accorded Goodyear's shipments is more convenient for, and better suited to the needs of, this shipper than is common carrier service." (Emphasis added.)

Perhaps a fair summary of the Commission's earlier attitude is the following language from *Jason W. House*, 1 M.C.C. 725, 736:

> "The basic test in determining whether a permit shall be issued is not public convenience and necessity but consistency with the public interest and the policy declared in section 202(a) of the Act . . . In absence of evidence that the continuation or institution of operations by these applicants as contract carriers of petroleum products from and to the considered points would adversely affect other carriers by motor vehicle now lawfully engaged in transportation of like traffic from or to these points, or that applicants are not fit, willing, and able to provide transportation as contract carriers, there is no valid basis for denying these applications."

It is true that in many of the later decisions of the Commission, it did apply the adequacy of existing service or unwillingness or inability test, thereby requiring the contract carrier to prove, in effect, public convenience and necessity. This was one of the conditions Congress hoped to correct by giving the Commission more definite standards for deciding the issue of consistency with the public interest. In commenting on the Commission's change in attitude with respect to granting contract carrier ap-

plications, and the effect of the amendatory language on this attitude, the Court below said (R. 178):

> "Earlier, it was required that once a contract carrier applicant had established a prima facie case, there was some burden on the protestants to come forward with evidence in rebuttal. See *Jason W. House Contract Carrier Application*, 1 M.C.C. 725. At about the same time the Commission held that the availability of adequate common carrier service alone did not preclude the granting of a contract carrier authority. See *T. J. Broom Contract Carrier Application*, 1 M.C.C. 425; *Howard W. Juett Contract* [fol. 244] *Carrier Application*, 1 M.C.C. 268. Clearly the effect of the amended statute is to restore these procedures to a degree, and to give emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case. And it is clear that under the narrow definition of contract carriage found in the new law, there is no occasion, necessity or warrant for the same standards of proof in both applications."

Even the Commission's interpretation of the statute since the 1957 amendments has not followed a consistent pattern. A number of applications, including the one which is the subject of this appeal, were denied primarily on the basis that existing common carriers were able and willing to handle the traffic involved, despite the fact that this language had been deleted from the bill by Congress. Several of these cases were noted by the District Court and the applicable language was quoted in its opinion (R. 170-172). The cases include *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254, 256; *Leo Holt, Jr., Extension—Pilings*, 77 M.C.C. 141, 144; *Wagner Contract Carrier Application*, 77 M.C.C. 777, 781; and *Elvin L. Reddish Contract Carrier Application*, 81 M.C.C. 35, 40 (also the subject of an appeal). The Court also cited the language used by the Commission in the common carrier case of *Ray D. Viengst Common Carrier Application*, 79 M.C.C. 265, 268, and noted that it was almost identical to that used

in the *Wagner* contract carrier case, *supra*. There is no doubt that the Commission has in some instances continued to apply a public convenience and necessity standard to contract carrier applications, using a test rejected by Congress.

On the other hand, there have been instances where the Commission has applied the statute in a different manner, giving less weight to the availability of common carrier service and more to a balancing of interests among applicant, the supporting shipper, and existing carriers. In some of these cases authority has been granted, on various theories, despite the fact that protesting common carriers appeared to be willing and able to handle the traffic.

In *William Edward Leary Extension—Willimantic, Conn.*, 81 M.C.C. 553, 557, the Commission made a specific finding that all protesting motor carriers were able and willing to handle additional traffic of the kind involved and feared that a grant of authority would drain traffic from their territories to their detriment. Some of the protestants had actually transported traffic for the supporting shipper while others had not. Despite this finding the Commission granted the application stating (pp. 558-559):

> "Our consideration of the evidence in the light of the criteria heretofore set out leads us to the conclusion that a need exists for the proposed service. The shipper requires the services of applicant who proposes to furnish it what is generally described as house carrier service, in that the applicant will furnish equipment around the clock; operate such equipment as directed by the shipper; his employees will work as an integral part of the plant's operations; and he is expected to and will provide service at times and in a manner which is not normally furnished by common carriers. Applicant presently furnishes this manner of service to the shipper as an intrastate carrier and desires to extend this to interstate service. While some traffic will be diverted from the existing carriers, it is fairly established that improvements in service

will result in benefits to the supporting shipper and its customers far outweighing any possible ill effects upon the opposing carriers."

In *Caledonia Lines, Inc., Extension—Utica, N. Y.*, No. MC-108313 (Sub No. 7), Division 1, July 31, 1961 (not printed in full), the following statement appears:

"The pertinent authorities, operations, and facilities of the motor protestants are described in detail in the examiner's report and need not be repeated here. Collectively, they can serve directly or through interline carriers, over both regular and irregular routes, practically the entire territory involved. They desire to participate in the traffic to the extent authorized by their certificates.

"Applicant seeks authority to extend its operations commoditywise and territorially to enable it to provide a complete service for Jones. Applicant has served as a contract carrier for Jones for many years. The supporting shipper's traffic represents all of applicant's interstate transportation. A grant of the requested authority will not deprive protestants of any traffic they now handle. Moreover, it is not likely that protestants would be tendered any of the involved traffic if the instant application were denied."

In *W. G. McCarty Contract Carrier Application*, No. MC-119898, Division 1, May 31, 1961 (not printed in full) the Commission made the following findings:

"In determining that the issuance of a permit will be consistent with the public interest and the national transportation policy we have considered the five tests enumerated in section 209(b): (1) applicant proposes to serve only one shipper; (2) the evidence clearly shows that it proposes a specialized service that common carriers, in general, and protestant carriers, in particular, do not normally provide; (3) a grant will have a negligible adverse affect on protestant inasmuch as they are not presently participating in the traffic and are not likely to do so; (4) a denial will prevent shipper from receiving a service necessary to meet competition and to reduce costs, and (5) shipper

support for the application is based on a careful survey of its new transportation requirements. Although the opposing carriers assert a willingness to serve shipper, we believe that the proposed service is needed and that it would be superior to that available from existing carriers."

In *Nyad Motor Freight, Inc., Contract Carrier Application*, No. MC-118567, Division 1, August 11, 1960 (not printed in full), the decision turned to a large extent on the changing character of the shipper's requirements and the application was granted despite the availability of common carrier service. The Commission found in part:

"The effect of a grant of authority upon the services of protesting carriers is steadily disminishing; already large portions of the traffic formerly handled by them have been diverted to private carriage. Whether a grant of this application would accelerate the process of erosion cannot be stated with certainty, but it seems reasonably clear that carriers such as Helm's cannot retain their present share of the traffic regardless of the disposition of this proceeding.

"The effect on applicant of a denial would naturally be adverse, even though its president would presumably continue his present business relationship with the shipper. The effect of a denial upon the supporting shipper, Grant, would be to obstruct the progress of that shipper's newly adopted mode of distribution. It is true that protestants collectively are authorized to meet the shipper's transportation needs and that they assert their willingness to handle its merchandise in hampers. Their ability, however, to accomplish the practical, individualized operation envisioned by the shipper is far from demonstrated. The shipper has made represenative use of existing service in the past, but the character of its distribution requirements under the changing circumstances discussed above no longer permits reliance on that service."

In *J. Capone & Sons, Inc., Contract Carrier Application*, 83 M.C.C. 505 a protesting common carrier was authorized to perform the proposed service and was willing to do

so. The evidence indicated that the common carrier was . . . willing to make special deliveries in lieu of its normal overnight service and to provide service on weekends, holidays, and after business hours. Although it served approximately 800 shippers, equipment was available which could be placed at the shipper's plant within 15 minutes. (p. 508). With this evidence before it the Commission found (p. 509)

> "A number of the services required, such as multiple pickups and deliveries and perhaps even the handling of exports and imports at the piers, could be provided satisfactorily by common carriers, or, at any rate, are services sometimes performed by common carriers. On the other hand, the constant availability of equipment at the shipper's plant, the integration of that equipment into its operations and the specialized services required at warehouses and piers warrant the conclusion that the shipper is entitled to the services of a contract carrier. With respect to (c), no existing carriers presently enjoys the traffic and a denial of the application conceivably could force applicant out of business and cause the shipper to resort to private carriage. Clearly, the adverse effect which a denial of the application would have upon applicant and the shipper outweighs any possible adverse effect that a grant of authority would have upon any existing services."

In this case there was no finding that existing service was inadequate. Instead the Commission balanced the various factors involved in the manner contemplated by the statute.

Thus the Commission cannot rely upon a consistent practice of articulating adequacy of existing service as a test for determining whether or not to issue a permit. The Commission has considered many factors, and has not consistently followed the adequacy of existing service test for it has ignored the test in many cases both before and after the 1957 amendments.

C. The 1957 Amendments Were Intended to and Did Change Existing Law and Do Not Include the Extraneous Tests Employed by the Commission.

Under section 209(b) as amended, the Commission is still directed to issue a permit upon a finding that the proposed operation will be consistent with the public interest and the national transportation policy. In making this determination, however, it is now specifically required to consider and apply five statutory tests; namely (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirements.

The amendments were meant to and did change existing law. "While the burden of proving a contract carrier application to be consistent with the public interest and the national transportation policy was not eliminated, the standards of meeting this responsibility were changed,"[11] and these standards do not involve a showing that common carriers are unwilling or unable to handle this traffic. This proposed requirement was specifically rejected by Congress. Both the language of the statute and its legislative history support the view that the Commission lacks authority to apply this test as a condition for granting a permit. In the District Court the Commission apparently conceded the validity of this position, but contended that it was proper to consider the "adequacy of existing service." Appellants continue to urge this proposition based partially on the alleged consistency of its application, and partially on their view that it is inherent in the criteria set forth. We have already demonstrated that it has not been consistently

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[11] See the remarks of Senator Smathers, *supra*, 103 Cong. Rec. 14035-36, where in discussing the changes in section 209 (b) he stated that "the Committee is proposing to give the Commission more helpful standards than are contained in the present law."

applied. We also believe that it is not a part of the criteria involved.

The adequacy of existing service test is indistinguishable from the willingness and ability test. For a carrier's service to be adequate, the carrier must first be willing to handle the traffic. In addition, it must also be *able* to handle the traffic to the satisfaction of the shipper. If a carrier is willing to handle the traffic, and is *able* to handle it in such a way as to satisfy the shipper's requirements, then its service may be said to be adequate. Conversely, if a carrier is unwilling to handle the traffic, or is unable to handle it in such a way as to satisfy the shipper's requirements, then obviously its service is inadequate. Adequacy, as used by the Commission, is a term embracing either willingness or ability or both. Over the years, the terms have, in fact, sometimes been used interchangeably. In cases cited by the District Court (R. 170-172), the willing and able test appears to be either the same as the adequacy test or the controlling factor in determining adequacy. In the instant proceeding, the Commission said that considering U.S.A.C.'s service to other shippers, and its ability and willingness to provide service to the supporting shippers, it could not be found that existing service has been shown to be inadequate. (R. 47). We see no possible way in which existing service can be found adequate without a finding, whether specific or implied, that existing carriers are willing and able to perform the proposed service, thereby employing the very standard which Congress rejected. The District Court concluded, correctly we believe, that there was no practical distinction between the tests; and that to the extent applicant had been required to show the protesting common carriers were unable or unwilling to meet the shipper's requirements, the standard was not supported by the language of section 209(b) whether under the guise of an "adequacy tests" or otherwise. (R. 177).

Of course a primary reason for bringing motor carriers under regulation was to bring about more stability and to

cure conditions resulting from over-competition. Prior to the 1957 amendments a contract carrier was free to actively solicit new business, acquire new shippers and generally to expand into the common carrier field if he saw fit and could do so. In such circumstances there might have been some justification for the Commission's use of an adequacy of existing service test in deciding contract carrier applications, in order to prevent these carriers from entering the general freight hauling field. Under the 1957 amendments this justification no longer exists. The Commission acquired the power to, and now regularly does, limit the service of a contract carrier to the shipper or shippers supporting the application. This power and its exercise eliminated the possibility that a contract carrier could actively solicit other business and insured that the service would be limited to the specific shippers for whom it was granted. It effectively removed the contract carrier from the field of general transportation and reinstated it in its more historic role as a substitute for private carriage. Since the carrier was no longer able to expand its activities to the point of serving large areas of the public, there was no longer any valid reason for requiring a showing of inadequacy of common carrier service. In the words of Commissioner Webb "the need to employ a public convenience and necessity standard in Section 209 proceedings disappeared when under the new law, permits ceased to be unrestricted licenses for hunting traffic." (R. 51). Congress appeared to be of the same opinion for it adopted specific criteria for determining contract carrier applications, none of which in our view involves adequacy of existing common carrier service.

The first test under the statute is the number of shippers to be served. This relates to whether applicant intends to serve "one or a limited number of shippers," and thus meet the first part of the definition of a contract carrier under section 203(a)(15) of the Act.

The second test involves the nature of the service proposed. We believe this second test also relates back to the definition of a contract carrier in 203(a)(15). If the service proposed involves either (a) the furnishing of transportation services through the assignment of vehicles for a continuing period of time to the exclusive use of each person served or (b) the furnishing of transportation services designed to meet the distinct need of each indvidual customer, then the proposed service is that of a contract carrier. This test does not, in our opinion, require a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. By adopting this attitude, the Commission is reading back into section 203(a)(15) that part of the definition which was omitted by Congress, namely, the phrase "and not provided by common carriers."

This whole area admittedly produces some apparent contradictions, since in theory contract and common carriage ought to be mutually exclusive. In practice, however, there sometimes is not much difference in actual operations, and there are areas where either type of carrier might be satisfactory. This fact, however, cannot be controlling because it involves a consideration rejected by Congress. Much of the value of contract carrier service lies in the fact that it does not serve the public generally and therefore can give greater attention to the needs of its particular customers. Even though from a purely mechanical standpoint a common carrier might be able to duplicate the operation, it does not follow that the service will be the same. And since Congress eliminated the phrase "and not provided by common carriers" from section 203(a)(15) as originally proposed, we think it error for the Commission to read this phrase back into the provisions of section 209(b) under the guise of considering the nature of the service proposed. If the proposed service involves either

the furnishing of transportation service through the assignment of vehicles for continuing period of time to the exclusive use of each person served or the furnishing of transportation services designed to meet the distinct need of each individual customer, the nature of the proposed service is that of a contract carrier.

The third criterion requires a consideration of the effect which granting the permit would have upon the *services* of protesting carriers. It is designed to afford a measure of protection for these carriers as was so found by the District Court (R. 174). This criterion does not contemplate consideration of the mere existence or availability of a protesting common carrier, which claims to be in a position to handle the traffic, but rather what effect, if any, granting of a permit would have on the *services* of such carrier. Where, for instance, a protesting carrier is actually serving a supporting shipper, and is participating in the traffic involved, the granting of a permit would be likely to divert traffic from the protesting carrier, with an attendant loss of revenue. If the diversion of this traffic would cause the services which the protesting carrier could offer to the public to be adversely affected to a material degree, then this should be considered by the Commission as one of the elements in deciding the issue of consistency with the public interest. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily no effect on its services.

The fourth criterion involves a consideration of the effect which denying a permit would have upon the applicant and/or its shipper. The Commission's view is that the effect on the shipper must depend upon the adequacy of existing service, which has the effect of providing additional protection for existing carriers. This provision can scarcely have been placed in the statute as an added protection for existing carriers, for their interest is protected by the preceding criterion. Rather, this provision quite obviously

was inserted in order to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. The District Court stated that "to a notable degree, this provision emphasizes the new distinction required by Congress between a common carrier certificate of public convenience and necessity, and the contract carrier's permit." (R. 175)

Whether or not adequacy of service is a part of a "public interest" standard, as contended by appellants, in the absence of more specific language is not germane in this case. Nor is the latitude which Courts have accorded "public interest" as a standard in other circumstances a controlling factor. In the statute under consideration, Congress has specifically enunciated its own standards for determining consistency with the public interest. The discretion which might otherwise attach to such a determination is not present here. Although the ultimate determination to be made is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy, the Commission is directed to consider five specific criteria. Adequacy of existing service is not one of these criteria; and its apparent equivalent, the willingness and ability of common carriers to provide service, was rejected by Congress. To adopt the construction urged by the Commission would be reading into the Act by implication what the Legislature rejected.[12]

There is nothing inconsistent here with the imposition of so-called "auxiliary and supplemental" restrict ons in the authority of motor carrier subsidiaries of railroads or with the views expressed in *American Trucking Associations, Inc.*, 364 U.S. 1, 80 S. Ct. 1570 (1960). The Court

[12] The court refused to follow this course in *Territory of Alaska* v. *American Can Company*, 358 U.S. 224, 227, 79 S. Ct. 273, 276 (1959).

was there dealing with section 5(2)(b) of the Act, 49 U.S.C. 5 (2)(b), relating to railroads or persons controlled by or affiliated with railroads. The principal question involved was the Commission's failure to impose certain limitations upon authority issued under section 209(b) to a motor carrier subsidiary of a railroad. The Court recognized that the National Transportation Policy and section 5(2)(b) express a general Congressional policy against railroad invasion of the motor carrier field and that the policy of section 5(2)(b) cannot be divorced from section 209 of the Act. While this involved a consideration of the National Transportation Policy and application of the Act as a whole, the actual problem was the Commission's lack of findings as to special circumstances to justify its failure to impose limitations sufficient to hold the carrier to a truly auxiliary and supplemental service.

In the instant case there is no Congressional policy that requires the Court to consider criteria other than those in section 209(b), or even suggests that it would be proper to do so. Nor is any different conclusion warranted by the Court's finding in *Schaffer Transportation Company* v. *United States*, 355 U.S. 173, 187-88, 78 S. Ct. 173, 176 (1957), that the National Transportation Policy is the yardstick by which the correctness of the Commission's actions will be measured. Rather the 1957 amendments and the criteria set forth in section 209(b) are intended to further the interests of the National Transportation Policy by providing the Commission with more helpful standards in deciding consistency with that policy and with the public interest. The sharper distinction drawn between contract and common carriers also indicates increased recognition of their distinctive role in transportation, and justifies the preservation of their inherent advantage under the National Transportation Policy.

The appellants rely upon *Bass* v. *United States of America*, 163 F. Supp. 1 (W. D. Va., 1958), *aff'd* 358 U.S. 333,

179 S. Ct. 351 (1959). In this case the appellant sought authority to transport passengers as a contract carrier. The common carriers of passengers who opposed the application also provided contract carrier services pursuant to the provisions of section 208(c) of the Act. In this case neither the Commission nor the Court gave any consideration to the five criteria set forth in section 209(b). The Court upheld the Commission's decision denying the application, not on the basis that common carrier service was available, but on the basis that contract carrier service was available. For those reasons the *Bass* case has no application to the case at Bar.

Appellants also rely upon the case of *Alexandria, Barcroft and Washington Transit Company* v. *U. S.* (E. D. Va., 1961), 14 F.C.C. Section 81,395. Here the Court decided that the service proposed was not that of a contract carrier, but that of a common carrier and for this reason reversed the Commission's decision granting contract carrier authority. The issues raised by the case at Bar, namely the proper application of the criteria in section 209(b) were not considered or discussed by the Court and any holding by the Court beyond the finding that the service proposed was that of a common carrier was *obiter dicta*. For these reasons, this case has no application to the instant one.

III. THE DISTRICT COURT ACCURATELY APPLIED THE STATUTE TO THE FACTS OF RECORD AND DID NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION.

Appellants, U.S.A.C., and the two Common Carrier Conferences contend that the District Court substituted its judgment for that of the Commission. This contention is without merit.

We would like to point out that the views expressed in the Commission's report only represent the thinking of a minority. Of the eleven Commissioners, four did not participate in the decision, one dissented, two concurred in

the result and one concurred in the result, expressing strong opposition to the employment of the sixth test. There were only three Commissioners who actually adopted the report as written (R. 51-52). Even though, the report expressed the views of the minority, the District Court did not substitute its judgment for that of the Commission.

The Court, as stated by appellants, did find that the Commission had imposed upon the applicant, the burden of showing that existing services are inadequate (R. 170). Appellants contend that this amounts to the Court substituting its judgment for that of the Commission because it was the protestant who proved what services it could perform. This argument is without merit for it completely ignores the fact that the basis for the Commission's denial was that the protestant's services had not been shown to be inadequate, a finding which clearly imposes the burden on the applicant which the Court found to be improper under the law. In reaching this conclusion, the Court interpreted the law and did not substitute its judgment for that of the Commission.

The District Court did find, as stated by appellants, that the Commission gave no consideration to the shipper's need for contract carrier service. However, simply because the Commission did consider the specialized service of the protestants does not justify the contention that the Court substituted its judgment for that of the Commission. The Court also found that: "The statute now contemplates two forms of motor carrier service . . . Now an element of shipper's service has been affirmatively recognized by Congress. . . . Under the statute a shipper is entitled to have his distinct needs met." (R. 175) It was the failure on the part of the Commission to recognize the evidence of the applicant as to this phase of the case which the Court critized, and by so doing it was not substituting its judgment for that of the Commission.

Appellants contend that the District Court held that the Commission *may not* deny a contract carrier application simply because the applicant has failed to meet one of the criteria. This the Court did not hold. It did say that the five criteria must be weighed or balanced and that failure to meet all five " . . . does not mean necessarily, . . . the Commission is warranted in rejecting the application." It also said that even if the Commission should find that a proposed contract carrier service would adversely affect a protesting carrier's service ". . . that in and of itself does not necessarily justify a denial of the permit." Here the Court was not substituting its judgment for that of the Commission, but interpreting the intent of Congress as expressed by the language in section 209(b).

SUMMARY OF ARGUMENT AND CONCLUSION

Congress by amending sections 203(a)(15) and 209(b) radically changed the entire concept of contract carrier regulation. The definition of a contract carrier was limited drastically, the Commission was granted broad powers to restrict the service which such carriers could perform even to limiting the service to a particular shipper, and definite standards were provided for determining whether a proposed service was consistent with the public interest. The standards did not include the "adequacy of service" or "willingness and ability" tests. In fact the latter test, though suggested by the Commission, was specifically rejected by Congress. The adequacy of existing service or the willingness and ability of protesting carriers to perform a proposed service are no longer proper tests for the Commission to apply.

The Commission's contention that it has consistently applied the above standards is without merit for it has not done so. Even if this were the case it now has a clear mandate from Congress not to apply such standards in the future. The services of common carriers are to be pro-

tected by weighing or balancing the effect on protesting carrier's services against the effect of denial of the application upon the applicant and its supporting shipper. This provision gives common carriers ample protection and assures shippers of contract carrier services when consistent with the public interest and the national transportation policy.

The lower Court's decision in this case correctly interprets the law. It recognizes that Congress intended to regulate contract carriers differently than they had previously been regulated and not only gives the Commission ample opportunity to protect the interests of existing carriers, but affords the Commission broad discretionary powers under the standards prescribed by Congress to carry out the provisions of the national transportation policy; even though, it does not impose the onerous burden of proof on contract carriers to prove that protesting carriers' services are inadequate. The Court by so construing the statute, did not substitute its judgment for that of the Commission, but simply gave the meaning to the true intent and purpose of the amendatory legislation.

Appellee, Contract Carrier Conference of the American Trucking Associations, Inc., for the foregoing reasons, respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Text of Statute Involved

Prior to August 22, 1957	Subsequent to August 22, 1957
Former § 203(a)(15)	*Amended § 203(a)(15)*
"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."	"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."
Former § 209(b)	*Amended § 209(b)*
"Application for permit; form and contents; issuance of permit; terms and condition.—Applications for such permits shall be made to the commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission may, by regulations, require. Subject to section 210, a permit shall be issued	"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations

Former § 209(b)

to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. The commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under section 204 (a)(2) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities,

Amended § 209(b)

covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, con-

Former § 209(b)

within the scope of the permit, as the development of the business and the demands of the public may require."

Amended § 209(b)

sistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."